

Eclecticism in Choice of Law: Hybrid Method or Mishmash?

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INTRODUCTION

Several conflicts scholars have identified a trend in choice of law opinions toward the use of what has been termed 'eclecticism.'¹ This approach involves use by the court of two or more distinct choice of law methods, or parts of those methods, in deciding a single choice of law issue.² For example, one common form of eclecticism is an opinion that

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1. Juenger, *Leflar's Contribution to American Conflicts Law*, 31 S.C.L. REV. 413 (1980); Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROBS. 10 (Spring 1977) [hereinafter cited as Leflar, *Plateau*]; Leflar, *Choice of Law: States' Rights*, 10 HOFSTRA L. REV. 203 (1981) [hereinafter cited as Leflar, *States' Rights*]; Leflar, *The Nature of Conflicts Law*, 81 COLUM. L. REV. 1080 (1980) [hereinafter cited as Leflar, *Conflicts Law*]; Peterson, *Proposals of Marriage Between Jurisdiction and Choice of Law*, 14 U.C.D. L. REV. 869 (1981); Rosenberg, *A Comment on Neumeier*, 31 S.C.L. REV. 443 (1980) [hereinafter cited as Rosenberg, *A Comment*]; Westbrook, *A Survey and Evaluation of Competing Choice-of-Law Methodologies: The Case for Eclecticism*, 40 MO. L. REV. 407 (1975).

2. Numerous such cases are collected in Leflar, *Plateau*, *supra* note 1, at 13-14, and Westbrook, *supra* note 1. For example, Leflar's analysis of *Wallis v. Mrs. Smith's Pie Co.*, 261 Ark. 622, 550 S.W.2d 453 (1977), concluded that his own Arkansas Supreme Court applied in *Wallis* not only Leflar's better law method but also the most significant relationship of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) [hereinafter cited as RESTATEMENT (SECOND)] and echoes of *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), itself an eclectic use of interest analysis and center of gravity.

Another eclectic opinion is *Pancotto v. Sociedade de Safaris de Mocambique*, 422 F. Supp. 405 (N.D. Ill. 1976), which Leflar finds to be a combination of interest analysis, most significant relation, and better law, Leflar, *Plateau*, *supra* note 1, at 18, and which Rosenberg considers to be a case in which the court "did use a blend of the interest analysis, *lex loci*, and the most-significant-relationship approach," Rosenberg, *A Comment*, *supra* note 1, at

announces that the law of state *X* applies because *both* an interest analysis approach and a center of gravity, or most significant relation, approach point to the law of *X*.

The distinguished conflicts scholar Robert Leflar seems to applaud this development;³ certainly he openly accepts it.⁴ Professor James Westbrook is thrilled.⁵ With this article I join the ranks of those who are critical.⁶ Indeed, I find most examples of eclecticism deplorable. The technique usually deprives choice of law of any certainty; it becomes incomprehensible to lawyers and lower court judges who cannot deal with a choice of law problem in ignorance of the choice of law method employed by the forum.

This Article repudiates eclecticism except in instances in which a jurisdiction formulates one single, new choice of law method by piecing together aspects of choice of law methods in use in other states, as, for example, when a court that follows interest analysis borrows center of gravity as a device for breaking true conflicts. In urging the abandonment of eclecticism, this Article certainly does not intend to suggest that a state should turn away from the 'modern' approaches to choice of law and reembrace the *lex loci*. Instead, a state supreme court that currently tolerates or engages in the type of eclecticism that applies multiple methods, as distinct methods, in the same opinion should adopt forthrightly one of them as *the* method for the state and should reject expressly the others. There is no reason at all that a modern, flexible, justice-seeking method cannot coexist with the important values of certainty and comprehensibility. Renouncing purposeless eclecticism will be an important step towards achieving that goal.

I. TERMINOLOGY

A. Choice of Law Method

By the term 'method,' I mean a theory for reaching a choice of law

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3. Leflar, *Plateau*, *supra* note 1, *passim* and especially at 26; Leflar, *States' Rights*, *supra* note 1, at 206; see also Leflar, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1247 (1963) (praising the eclectic *Babcock* decision); Leflar, *Conflicts Law*, *supra* note 1, at 1080.

4. See Juenger, *supra* note 1, at 419, who states that Leflar "seems quite sanguine about the current eclecticism," or, at 417, "quite pleased" with the development; see also Peterson, *supra* note 1, at 870-71, who states that the "eclectic spirit" of the past decade has led to a new theory that is "a highly flexible amalgam of several more specific theories."

5. Westbrook, *supra* note 1, *passim*.

6. See Juenger, *supra* note 1.

result.⁷ For example, *lex loci*, at least in tort and contract cases, is a method based on the theory that one key territorial factor with respect to the matter in litigation should supply the controlling law. *Lex loci* is a method that has been expressed in detailed *rules*.⁸ For example, the validity of a contract is decided by the law of the place of making. Center of gravity is a *method*⁹ based on the theory that all territorial factors rather than one should be examined in finding the governing law. Rules can be formulated under that method, also.¹⁰ Pure better law is a distinct method, but its adherents have not suggested that rules (for example, the injured party always wins in a tort suit) need be developed to make it more workable.

B. Interest Analysis as a Method

Interest analysis is a term employed to describe perhaps a dozen different methods. Each method agrees generally on the process of identifying interests¹¹ and on the recognition and resolution of false conflicts.¹² Inter-

7. See Sedler, *Rules of Choice of Law Versus Choice of Law Rules: Judicial Method in Conflicts Tort Cases*, 44 TENN. L. REV. 975, 978 (1977) [hereinafter cited as Sedler, *Rules*]. This useful article demonstrates how a method can be stated with such specificity that the need for rules becomes slight.

8. For a definition of a 'rule,' see Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1972).

9. See von Mehren & Trautman, *Constitutional Control of Choice of Law: Some Reflections on Hague*, 10 HOFSTRA L. REV. 35, 44 (1982).

10. Much of the Restatement Second consists of such rules stated in the form of presumptions. See part II of this Article.

11. Judge Breitel is correct, see *Tooker v. Lopez*, 24 N.Y.2d 569, 597, 249 N.E.2d 394, 411-12, 301 N.Y.S.2d 519, 543 (1969) (Breitel, J., dissenting), in saying that interest analysis is a "personal law" approach. See also Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980). In the great majority of cases, the court simply finds the domicile of plaintiff and defendant and assigns to each party the law of that domicile. In addressing legal issues to which interest analysis can be applicable, see *infra* notes 187, 230, 265-266, it is quite unusual for a state involved only territorially to have an interest in the application of its law.

12. The cornerstone of interest analysis is the recognition of false conflicts. J. MARTIN, *PERSPECTIVES ON CONFLICT OF LAWS: CHOICE OF LAW* 85 (1980); Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 176, 196 (1981). That term does not mean that there is no choice of law problem but rather that once states involved only territorially, and hence with no 'interest' in resolving the issue, are eliminated, all the remaining involved states agree on the pertinent substantive rule. See generally Leflar, *A Response from the Author*, 31 S.C.L. REV. 457, 465 (1980); Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 U.C.L.A. L. REV. 181, 186 (1977) [hereinafter cited as Sedler, *Governmental Interest Approach*]. What I call lawmaker chauvinism ("our law is just for the benefit of our domiciliaries") is thus the heart of interest analysis, because without that approach, no false conflict could exist. Accord, Ely, *supra*, at 178. The term 'interest analysis' is used in this article, as it is understood by most conflicts scholars, to exclude a method that recognizes an interest in a state

est analysis must be viewed as breaking into discretely different methods because of the variety of techniques used in interest analysis jurisdictions for breaking true conflicts. The result in each case depends on which 'break device' is employed.

True conflicts are of two types. In the first, the law of the plaintiff's domicile favors him, and the law of the defendant's domicile is prodefendant. This can aptly be called a *true-true* conflict. In the other, the law of the plaintiff's domicile favors defendant, and vice versa. This can be called a zero-interest conflict¹³ or, to make clear that this is a form of true conflict,¹⁴ it can be called a true-disinterested conflict.¹⁵ Some

only territorially involved (e.g., the state where an accident occurred or where a contract was signed) in having its law applied to nondomiciliaries in order to 'do justice.' Under that theory a false conflict—as understood by adherents of interest analysis—is impossible. That theory underlies the method called better law, not interest analysis.

13. See Twerski, *The Zero Interest Case*, in J. MARTIN, *supra* note 12, at 86. See also Reppy, *Quasi-Community Property Comes to Texas*, 9 COMMUNITY PROP. J. 171, 182 (1982). As Weintraub has stated:

The classic "no interest" case is one in which the plaintiff's state has a law favorable to the defendant and the defendant's state has a law favorable to the plaintiff. The term "no interest" comes from the argument that neither state is interested in having its own law apply. The plaintiff's state has no interest in protecting the defendant who comes from another state and the defendant's state has no reason to give the plaintiff more compensation than he would get under the law of his own state.

Weintraub, *The Future of Choice of Law for Torts: What Principles Should Be Preferred?*, 41 LAW AND CONTEMP. PROBS. 146, 153 (Spring 1977) [hereinafter cited as Weintraub, *Principles*].

14. That is so because the term 'false conflict' is used to describe the situation in which the removal of states only territorially involved leaves one or more *interested* states having the same rule of law, so that the choice of law problem is solved. In the zero interest case, removal of states only territorially involved leaves two or more disinterested domiciliary states with different rules of law. The conflict has not been solved; hence, what one is dealing with is a type of true conflict.

15. Currie called this the "unprovided for case." See, e.g., Currie, *Survival of Actions: Adjudication Versus Automation In the Conflict of Laws*, 10 STAN. L. REV. 205, 229 (1958), reprinted in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 152 (1963). [Editor's Note: Since most of Currie's articles are reprinted in *SELECTED ESSAYS ON THE CONFLICT OF LAWS*, a corresponding page reference to this work will appear throughout this Article in brackets immediately after the citation to the appropriate page in Currie's originally published article.] The phrase "unprovided for case" seems silly, because each court that has had to face the true-disinterested conflict has had to provide some way for resolving it.

The true-disinterested case is by no means an unusual "phenomenon" subject to "discovery" by Currie nor an "anomaly" the disclosure of which should astonish. R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS* 303-04 (3d ed. 1981). Currie's seminal explanation of interest analysis contained a chart which illustrated that under varying fact-law patterns, the true-disinterested conflict will arise just as often as the true-true. Currie, *Married Women's Contracts: A Study in Conflict of Laws Method*, 25 U. CHI. L. REV. 227, 233 [77, 84] (1958) [hereinafter cited as Currie, *Married Women's Contracts*]. Potential plaintiffs simply

break devices, such as interest weighing and comparative impairment, can be used only to break true-true conflicts,¹⁶ while at least one break device, common policy, is usable only for true-disinterested conflicts.¹⁷ Among the break devices suggested for all types of true conflicts are forum law, the *lex loci*, the center of gravity's law, the better law, and the law the parties would expect to have applied.¹⁸

Some of these devices are unable to break the conflict in cases in which they are supposedly to be employed. For example, in a true-true conflict, comparative impairment and interest weighing seldom can supply a solution because usually the failure to apply an interested state's law results in one hundred percent impairment,¹⁹ and usually one involved state has as great an interest in applying its law as does the other domiciliary state. In these situations the interest analysis jurisdiction that uses as a preferred break device one that cannot resolve the conflict must have in reserve a fallback or second choice break device.²⁰ It is also quite possible for the jurisdiction to use different break devices depending on whether the case is one in tort, contract, succession, or another area. It would be reasonable, for example, for the interest analysis jurisdiction to confine the better law break device to tort cases, to foster 'spreading the risk,' and to break true conflicts in contract cases by territorial considerations

do not choose a place to live because of proplaintiff law. Thus the odds are fifty percent that the domiciliary of the proplaintiff state involved in conflicts litigation will be a defendant. Cf. Sedler, *Governmental Interest Approach*, *supra* note 12, at 233 n.283 (zero-interest cases have arisen more often than Currie anticipated).

16. See *infra* note 146.

17. See Sedler, *Governmental Interest Approach*, *supra* note 12, at 235; Trautman, *The Relation Between American Choice of Law and Federal Common Law*, 41 *LAW & CONTEMP. PROBS.* 105, 116 (Spring 1977); von Mehren, *Choice of Law and the Problem of Justice*, 41 *LAW & CONTEMP. PROBS.* 27, 36 (Spring 1977). The type of true-disinterested conflict in which this break device is workable is one in which the prodefendant rule is a narrow exception to a general policy favoring the plaintiff, e.g., a guest statute exempting a negligent driver from liability to a plaintiff having a peculiar status. If, as in a true-disinterested conflict, the defendant is not within the class intended to be benefitted, the court can eliminate the narrow exception, and expose the policy in favor of recovery that is 'common' to the substantive law of the other involved state.

In a true-true conflict, common policy cannot be used as a break device because the lawmaker who fashioned the narrow exception intends it to be applied to the case before the court, e.g., the spendthrift's right to disaffirm contracts, which was the narrow-exception rule before the court in *Lilienthal v. Kaufman*, 239 Or. 1, 395 P.2d 543 (1964).

18. This device would probably be the same as center of gravity in practice. See the listing of various break devices in Brilmayer, *supra* note 11, at 394.

19. See *infra* text accompanying note 130.

20. For example, in California comparative impairment apparently is the preferred break device, comparative pertinence (better law) the second choice device, and *lex loci* or center of gravity the ultimate fallback device for breaking true conflicts. See *infra* text accompanying notes 124-150.

or by a policy in favor of validity.

It can be seen, then, that the possible configurations of some form of interest analysis method are enormous; thousands of variations are possible given the different treatments available for true-true and true-disinterested conflicts as well as various pecking orders of break devices. In practice, however, it may be that only half a dozen states are employing a form of interest analysis *exclusively*, that is, not in mishmash, an eclectic method of choice of law that deliberately uses an odd number of other recognized methods. A court desiring to canvass the various choice of law methods available could limit interest analysis methods to these pure systems and disregard usage of interest analysis in mishmash.

C. Types of Eclecticism

An analysis of what actually is going on in the numerous 'eclectic' choice of law cases that Professor Leflar and others have found must begin with a demonstration of the falsity of the cornerstone of Leflar's approval of them: that all of the modern methods "are consistent . . . and likely to produce about the same result on a given set of facts."²¹ A brief look at three oft-litigated fact patterns reveals that this is not so. First, the situation of a false conflict in favor of 'bad' law, that is, prodefendant, with territorial connection to a state with 'good' law illustrates the error of Professor Leflar's theory. Two examples of this situation are *Kell v. Henderson*²² and *Milkovich v. Saari*.²³ The plaintiff prevails under the pure better law method, maybe under center of gravity, and, depending on how bad the bad law is, under Wisconsin's brand of interest analysis, which reserves a drag-on-coattails exception to allow application of pure better law.²⁴ Under all other forms of interest analysis, the defendant prevails.

The second situation that shows the weakness of Leflar's theory is the true-true conflict in which the only connecting factor to the 'good' law is the domiciliary status of the plaintiff. Examples of this situation are the cases of *Rosenthal v. Warren*²⁵ and *Maguire v. Exeter & Hampton Elec-*

21. R. LEFLAR, AMERICAN CONFLICTS LAW § 109 (3d ed. 1977), *quoted with approval in In re Air Crash Disaster*, 644 F.2d 594, 610 (7th Cir.), *cert. denied sub nom. Lin v. American Airlines, Inc.*, 454 U.S. 878 (1981). Writing in 1972, however, Leflar realized that the various 'modern' choice of law methodologies did point to different results in many cases. Leflar, *The Torts Provisions of the Restatement (Second)*, 72 COLUM. L. REV. 267, 270 (1972) [hereinafter cited as Leflar, *The Torts Provisions*].

22. 26 A.D.2d 595, 270 N.Y.S.2d 552 (1966).

23. 295 Minn. 155, 203 N.W.2d 408 (1973).

24. See *infra* text accompanying notes 233-245.

25. 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973) (damages limitation); 374 F. Supp. 522 (S.D.N.Y. 1974) (charitable immunity issue on remand).

*tric Co.*²⁶ Plaintiff wins under pure better law; under interest analysis with a forum law break device, if the forum has the good law; and under interest analysis with a better law break device. Defendant wins under center of gravity; restrained better law New Hampshire style;²⁷ interest analysis with either a lex loci or center of gravity break; interest analysis with a forum break, if the forum has the bad law; and, with respect to some issues, interest analysis with a comparative impairment break.

The third example in which modern choice of law methods reach different results is the true-disinterested conflict with the heaviest territorial connections in the plaintiff's home state, which has the bad law. Again, under pure better law, plaintiff wins, as he does if he sues defendant at defendant's home and the method employed is interest analysis with a forum break. No matter where he sues, plaintiff wins under interest analysis with a common policy break device in situations in which that device can be employed. Defendant wins under center of gravity, under New Hampshire's restrained better law method, and under interest analysis with a lex loci or center of gravity break.

The only time all modern methods will reach the same result is in a false conflict in which the bad law is involved only territorially and the territorial connection is fortuitous because the center of gravity is elsewhere. That is, the sole point of agreement is that a fortuitous event occurring in a state with bad law should not be the basis for applying that bad law. Accordingly, an 'eclectic' opinion in which the court employs two or more distinct methods cannot be explained on the theory that there really is only one modern method that can be stated in different ways, as the court has done.

I have tried to imagine why eclectic opinions tend to be written and have come up with the possibilities that follow.

Methodless Ad Hoc Decisionmaking. The judge decides simply on the basis of sympathy factors which party should win and then tells his law clerk: "Write me an opinion for plaintiff employing all choice of law methods that produce a victory for plaintiff."²⁸ If the clerk determines that twelve methods exist in the various states for dealing with the problem and defendant wins under nine of them, the clerk ignores those nine and writes an opinion showing how plaintiff wins under the three that favor him.

I hope this is not what is happening in any of the eclectic cases. It

26. 114 N.H. 589, 325 A.2d 778 (1974).

27. See *infra* note 239.

28. I suppose this could be called a method: 'good guy wins.' This method differs from pure better law as a method in that if an insurance company is the plaintiff because its property has been damaged by a little guy, the law that is normally 'worse' and rejected in a state using the better law method is used instead so that the 'good guy' can prevail.

would be deplorable to have the outcome turn on a value judgment on which *party* was more deserving, even to a conflicts scholar who finds it tenable to base the decision on which *law* is better.

Pure Better Law in Disguise. The judge proceeds in the secrecy of chambers just as a Minnesota judge does openly: deciding what law is better. But the judge is too embarrassed to allow his opinion to reveal that this was the method he employed. Therefore, he gives the law clerk the same instruction as above: "Write an opinion under which plaintiff prevails, and employ all methods that support the result." Among those methods will be the better law method, which of course becomes more palatable when it is described instead as Leflar's five choice-influencing considerations.²⁹ But the significance of better law will be disguised when the opinion also incorporates all other choice methods that reach the same result. The remaining methods that lead to the opposite result are not mentioned in the opinion.

I suspect that this is indeed what is happening in many of the eclectic opinions. Since the upshot is use of a 'closet' better law methodology, no wonder Leflar is so pleased with eclecticism.³⁰ He should call on these secret adherents to come out of the closet. It is appalling to hide needlessly from the practicing bar and lower court judges the method actually used.

Confused Lower Court or Federal Court Judge. This confusion must explain a large number of eclectic cases.³¹ The federal judge or state intermediate appellate court judge reads the various opinions of the high court of the state and cannot understand what is going on. One case is decided by center of gravity; the next one, without overruling the former, is decided by interest analysis, and so forth. The author of the opinion is not sure whether the state's high court really intends a mishmash or just does not know what it is doing. Therefore, he applies each method he has seen in a recent opinion of the high court. If there is an odd number of such methods, a result always can be reached (for example, 3-2 for defendant). Perhaps ties can be broken in favor of the plaintiff by giving the better law method one and one-half rather than one vote, if better law is one of the methods on the list of those he has found in the state supreme

29. Leflar believes that 'better law' dictates the outcome in eclectic opinions. See Leflar, *Plateau*, *supra* note 1, at 26.

30. See *supra* text accompanying note 3.

31. Probably hundreds of such decisions could be found. Among them would be *Melville v. American Home Assurance Co.*, 443 F. Supp. 1064, 1077, 1082-94 (E.D. Pa. 1977), *rev'd*, 584 F.2d 1306 (3d Cir. 1980); *Pancotto v. Sociedade de Safaris de Mocambique*, 422 F. Supp. 405 (N.D. Ill. 1976); see also *Southern Int'l Sales Co. v. Potter & Brumfield Div.*, 410 F. Supp. 1339, 1341 (S.D.N.Y. 1976) (federal judge unsure if New York method is most significant relation or interest analysis).

court's opinions.

Kitchen Sink. Although I do not seriously believe that any eclectic court intends to adopt eclecticism itself as a method, this possibility is a conceivable explanation of eclecticism. The judge keeps a master list of all methods he recognizes. These could include all those in use in the United States at the time of the decision, or all of them plus scholarly methods such as Cavers' principles of preference³² and Ehrenzweig's proper law in a proper forum,³³ which have yet to be adopted at the state level.³⁴ He then has the law clerk, because he is too busy to do it himself, apply each method to the fact-law pattern and tally one 'vote' for the plaintiff or the defendant based on the result reached under each method. Interest analysis should get as many votes as there are distinct break devices for dealing with the particular case.

If the total number of methods is an even number, a tie is possible, and the kitchen-sink method must have a tie-breaking device. One possibility: give forum law, if it is constitutionally eligible, one and one-half votes, or give the better law one and one-half votes.

*Odd-Numbered Mishmash.*³⁵ This article uses the term 'mishmash' to describe an eclectic method of choice of law that deliberately uses three or five or seven of the other recognized methods.³⁶ (Any more than that and the jurisdiction will be in the kitchen sink, I suspect.) The court is to apply each method in the mishmash to the fact-law pattern, and each produces one vote for the plaintiff or the defendant. For example, a three-method mishmash might consist of center of gravity, better law, and interest analysis with a forum break. The application of this mishmash to *Milkovich v. Saari*,³⁷ for example, results in one vote for the plaintiff because the common-law rule of liability for ordinary negligence is 'better' than a guest statute, and the defendant gets one vote because the case is a false conflict in favor of Ontario's guest statute. The outcome

32. See *infra* note 155.

33. See Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach,"* 18 OKLA. L. REV. 340 (1965).

34. A true believer in kitchen-sinkism would have *lex loci* on his list. A 'modern' kitchen-sinker would not allow *lex loci* to cast a vote.

35. Leflar created this useful term:

[M]any judicial opinions do not distinguish between scholarly theories, but lump several or all of them together as 'the' new law. Another result can be, and sometimes is, a vague mish-mash, which no scholarly theorist would willingly claim for himself. The mish-mash is likely, however, to be constitutionally permissible, so that it too is a part of the American law of conflict of laws.

Leflar, *Conflicts Law*, *supra* note 1, at 1080. My use of "mishmash" is somewhat different from his. I believe Leflar was using it in the sense of Rosenberg's "blend of coffee," see *infra* note 40.

36. Except, of course, the kitchen sink method.

37. 295 Minn. 155, 203 N.W.2d 408 (1973).

depends on the location of the center of gravity.

It should be clear that an even-numbered mishmash is impossible, as a method, because there must be some way to break ties, and whatever that device is becomes the odd prong of the mishmash. For example, Wisconsin has declared that it uses both center of gravity and better law in contract cases.³⁸ But Wisconsin must be able to decide the case in which the territorial factors lie in the jurisdiction with the worst law, with only a domiciliary connection to better law. If the tie is to be broken in favor of the better law, there is no mishmash. Center of gravity can never prevail unless the better law comes from the territorially involved jurisdiction. Thus, the method would be pure better law. If the tie-breaking device is a third *method*, the mishmash is triple and not double.³⁹

Blend of Coffee. This is Professor Rosenberg's analogy to describe the only type of eclecticism that this Article finds acceptable.⁴⁰ The blending has occurred in some interest analysis jurisdictions. When the conflict before the court is not false, the forum may turn to better law⁴¹ or center of gravity⁴² as a basis for breaking the conflict and applying the law of one of the domiciliary states.

Uninformed Judge. The writer of the opinion, because of the lousy briefs of counsel, does not understand that there is a difference between interest analysis and, for example, the most significant relation method or center of gravity. Sadly, this probably explains a sizeable fraction of the eclectic opinions.

The balance of this Article looks closely at the Restatement Second as a source of eclecticism and at the degree of eclecticism in the choice of law methodology employed in seven of the leading 'modernistic' jurisdictions: California, Kentucky, Minnesota, New York, Oregon, Pennsylvania, and Wisconsin. One goal of the exercise is to try to go behind the eclectic opinions in an attempt to discover if there really is one method

38. See *infra* text accompanying notes 231-245.

39. A nonmethodological tie-breaker device is possible, however. A break in favor of forum law would not necessarily be the addition of the third method of interest analysis with a forum break. Consider the *Milkovich* facts with a belief that Ontario as starting point and ending point of the trip was the territorial center of gravity. Under the better law-center of gravity form of mishmash, plaintiff gets one vote for Minnesota's better law and defendant gets one under center of gravity for Ontario's guest statute. A forum tie break means plaintiff prevails since suit was brought in Minnesota. Under a triple mishmash with Currie-style interest analysis as the third method, defendant wins because the conflict is false, and forum law is never consulted.

40. In some cases, he notes, the eclectic court refers to elements of distinct methods and the result is a "blend—like a good cup of coffee, I suppose—of a number of modern theories." Rosenberg, *A Comment*, *supra* note 1, at 444.

41. As in Wisconsin. See *infra* text accompanying notes 231-245.

42. As in New York. See *infra* text accompanying notes 151-174.

that can explain the decisions that seem, on first reading, to use different or multiple rationales.

II. ECLECTICISM AND THE RESTATEMENT SECOND

The Restatement Second,⁴³ with its 'most significant relationship' method for choice of law,⁴⁴ has spawned eclecticism in two ways. First, it seems that some courts that ideologically accept interest analysis as the appropriate approach to allocating sovereign power feel uncomfortable with the fact that the prestigious American Law Institute has placed its imprimatur on a different—a territorial-based—method. Such courts will often cite to the Restatement Second in addition to engaging in interest analysis, at least in a case in which the two methods reach the same result.⁴⁵ Others may announce that they use both the significant relation method and some different method that the state has refined independently of the Restatement Second.⁴⁶ Second, some courts appear to have misconstrued sections 6(2)(b) and (c)⁴⁷ as engrafting onto the territorial-based significant relation method aspects of a Currie-style interest analysis. This reading of section 6 makes the method in the Restatement Second itself eclectic.⁴⁸

The crux of the Restatement Second's methodology is center of gravity territorialism.⁴⁹ But unlike the earlier New York center of gravity theory,⁵⁰ the Restatement Second does not seek to find a center of gravity for an entire case or cause of action. Instead, accepting *dépeçage*, the new territorial method, at least with respect to most contract and tort cases,⁵¹

43. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). This began to appear in tentative draft form in 1953. It was promulgated and adopted as a Restatement by the American Law Institute in 1969, and was published in 1971, after severe criticism by a number of conflicts scholars. See, e.g., Ehrenzweig, *The "Most Significant Relationship" in the Conflicts of Law of Torts*, 28 LAW AND CONTEMP. PROBS. 700 (1963); Weintraub, *The Contracts Proposals of the Second Restatement of Conflict of Laws—A Critique*, 46 IOWA L. REV. 713 (1961) [hereinafter cited as Weintraub, *The Contracts Proposals*]. See also Sedler, *The Contracts Provisions of the Restatement (Second): An Analysis and a Critique*, 72 COLUM. L. REV. 279 (1972) [hereinafter cited as Sedler, *Contracts Provisions*].

44. RESTATEMENT (SECOND) § 222.

45. Compare the Oregon experience, *infra* text accompanying notes 175-189.

46. For a discussion of Wisconsin's treatment of contracts cases, see *infra* text accompanying note 245.

47. RESTATEMENT (SECOND) § 6(2)(b)-(c).

48. See *infra* note 64.

49. See Fuld, *Willis L.M. Reese*, 81 COLUM. L. REV. 935, 936 (1981).

50. See *Haag v. Barnes*, 9 N.Y.2d 554, 175 N.E.2d 441, 216 N.Y.S.2d 65 (1961); *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954); Leflar, *The Torts Provisions*, *supra* note 21, at 269.

51. Since the fields of contract and tort provide the cases and issues in which the general consensus is that some 'modern' methodology is appropriate, this article confines its analysis

recognized that the significance of a territorial contact depended on the type of legal rule at issue. Thus, the place of injury in a tort suit might be of great weight on some issues but of little or no weight on others.

To aid in application of the new methodology, the tentative drafts formulated 'rules' that often contained presumptions of where the center of gravity—the state with the most significant relation—would be for specific issues. Thus, one tentative draft stated a presumption that if the state of contracting and of performance were the same, its law presumptively governed most contract issues; otherwise, numerous territorial factors were to be weighed.⁵² The basic presumption was supplemented by a series of detailed sections treating subissues of contract law and types of contracts, either providing that the basic presumption applied or declaring a different presumptive center of gravity.⁵³

The Restatement Second's initial approach to tort law was quite similar. In general, a center of gravity was to be found by examining contacts at the place of injury, place of allegedly tortious conduct, domicile(s) of the parties, and seat of relationship, if any, between the parties.⁵⁴ Again, the basic approach was supplemented by a series of sections⁵⁵ dealing with particular torts and tort law issues. Some of them adhered to the general approach, but many others declared a presumptive center of gravity in a specific location, often in the state of the place of injury.⁵⁶ The tentative draft added that if the alleged tortious conduct also occurred in the state of injury, that state's law "almost invariably" would apply.⁵⁷

In determining where the center of gravity was on a particular issue or whether a presumptive territorial choice could be overcome, the courts were directed to "consider the . . . relevant purposes of the tort rules involved."⁵⁸ For example, if the purpose of the tort rule was to deter conduct, the place of acting would be likely to have a more significant relation than the place of injury; and this would be so without regard to

of the Restatement Second's methodology to these areas of law.

52. RESTATEMENT (SECOND) §§ 332, 332b (Tent. Draft 1961). This presumption applied only if the contract did not contain an express law-selection provision. This approach is now found in § 188 of the Restatement Second.

53. These are presently found in RESTATEMENT (SECOND) §§ 189-207. An example of a presumptive center of gravity departing from the ordinary presumption is found in § 192, presuming validity of a life insurance contract to be governed by the law of the insured's domicile at the time of application.

54. RESTATEMENT (SECOND) § 379 (Tent. Draft 1963), now found in § 145 of the Restatement (Second).

55. RESTATEMENT (SECOND) §§ 146-180.

56. See, e.g., RESTATEMENT (SECOND) § 146: "In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties" unless, with respect to an issue, this presumption can be overcome.

57. RESTATEMENT (SECOND) § 379a(1) (Tent. Draft 1963).

58. *Id.* § 379(3).

whether that state sought to eliminate or to sanction the allegedly tortious conduct. Likewise, if the primary reason for recognizing the cause of action sued on was to compensate the victim for injury, the place of injury would probably have the more significant relation to the action for choice of law purposes. Again, that would be so whether the state where the injury occurred granted or denied compensation.⁵⁹

In other words, consideration of the relevant purpose of the tort rule at issue contained no element of bias in favor of recovery by the plaintiff; it was not a disguise for importing into the 'most significant relationship' methodology aspects of the 'better law' approach. The tort and contract tentative drafts were faithful to a flexible territorial approach toward allocation of sovereign power in the multistate case.

Confusion over just what the choice of law theory and implementing methodology were in the Restatement Second was generated in 1967, when the tentative drafts were replaced by Proposed Official Drafts. Both the guidelines on how to determine a center of gravity for a particular type of issue⁶⁰ and the various presumptions of the controlling territorial factor for particular issues, or types of contracts and torts,⁶¹ became subject to an overriding 'laundry list' of choice of law mumbo jumbo: section 6. In pertinent part, it states:

- (2) When there is no such [statutory] directive, the factors relevant to the choice of the applicable rule of law include
 - (a) the needs of the interstate and international systems,
 - (b) the relevant policies of the forum,
 - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
 - (d) the protection of justified expectations,
 - (e) the basic policies underlying the particular field of law,
 - (f) certainty, predictability and uniformity of result, and
 - (g) ease in the determination and application of the law to be applied.⁶²

The Supreme Court of West Virginia has concluded that the addition of section 6 makes the Restatement Second's choice of law methodology a

59. *Id.* § 379 comment c.

60. For example, in tort cases one turns to § 145 to find the pertinent territorial factors and then reverts to § 6, with the list of territorial connections, to find the state with "the most significant relationship to the occurrence and the parties under the principles stated in § 6." *RESTATEMENT (SECOND) § 145*. Section 188 has a mirror provision for finding territorial contacts in contract cases that are to be taken to § 6 for analysis.

61. See, e.g., in tort cases, *RESTATEMENT (SECOND) §§ 146-160, 164-166, 169, 172, 175-180*; and, in contract cases, *RESTATEMENT (SECOND) §§ 189-193, 195-199, 202-203*.

62. *RESTATEMENT (SECOND) § 6*.

"hybrid" of territorialism and "Leflar's five factor test."⁶³ Other courts characterize section 6 as fastening a Currie-style interest analysis onto the flexible center of gravity approach.⁶⁴

The West Virginia court is only partly correct. Four of the five Leflarian choice-influencing considerations have made their way into section 6,⁶⁵ but the most important of the five⁶⁶—better law—has not. The flabby language in the tentative drafts⁶⁷ about considering "the basic policies underlying the particular field of law" is carried over as subsection

63. *General Elec. Co. v. Keyser*, 275 S.E.2d 289, 295 (W. Va. 1981) (declining to "adopt the Restatement" and applying the "traditional" methodology).

64. See *Melville v. American Home Assurance Co.*, 443 F. Supp. 1064, 1084 (E.D. Pa. 1977), *rev'd*, 584 F.2d 1306 (3d Cir. 1978). After observing that the provisions of the Restatement Second that appear after § 6 are territorial in theory and that some of the considerations in § 6 are also territorial in theory, the court stated:

Countering these strong territorial currents are §§ 6(b) and (c), which counsel evaluating contacts through the "relevant policies of the forum and other interested states," in a manner virtually indistinguishable from Professor Currie's interest analysis. Thus *Restatement II* may be said to have one foot in the camp of *Restatement I* and the other foot in the camp of interest analysis.

Id. at 1084.

65. Leflar's choice-influencing considerations are laid out in Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1586-87 (1966) [hereinafter cited as Leflar, *More*]. In addition to "Application of the Better Rule of Law," *id.* at 1587, the considerations are, together with corresponding subsections of § 6 of the Restatement Second, as follows:

"Predictability of Results," Leflar, *supra*, at 1586; "certainty, predictability and uniformity of result," RESTATEMENT (SECOND) § 6(2)(f).

"Maintenance of Interstate and International Order," Leflar, *supra*, at 1586; "the needs of the interstate and international systems," RESTATEMENT (SECOND) § 6(2)(a).

"Simplification of the Judicial Task," Leflar, *supra*, at 1586; "ease in the determination and application of the law to be applied," RESTATEMENT (SECOND) § 6(2)(g).

"Advancement of the Forum's Governmental Interests," Leflar, *supra*, at 1587; "the relevant policies of the forum," RESTATEMENT (SECOND) § 6(2)(b).

The Restatement Second adds to the Leflarian smorgasbord of choice of law principles the following additional considerations:

"[T]he relevant policies of other interested states and the relative interests of those states in the determination of the particular issue," RESTATEMENT (SECOND) § 6(2)(c); "the protection of justified expectations," RESTATEMENT (SECOND) § 6(2)(d); "the basic policies underlying the particular field of law," RESTATEMENT (SECOND) § 6(2)(e).

Note that like Leflar, with his five considerations, the Restatement Second is careful to have an odd number—seven. Thus, it should be impossible, if each consideration gets one vote for state X or state Y law, to end up with a tie in either method. Unfortunately, the cases applying both approaches invariably find one or more considerations irrelevant, which can leave the courts pondering what to do under Leflar's test or how to formulate a center of gravity if the various considerations point different ways, creating a tie vote of 1-1, 2-2, or even 3-3 (under § 6).

66. See Leflar, *States' Rights*, *supra* note 1, at 210.

67. See *supra* text accompanying note 43.

(2)(e) of section 6.⁶⁸ The comments to section 6 say that this militates in favor of upholding the validity of a contract⁶⁹ but in no way suggest that it favors imposition of the broadest tort liability, as does the better law approach.⁷⁰ One will recall that the comments to the tentative draft also contained no suggestion that the 'basic policies' language promoted a prorecovery choice of law decision in tort cases. It seems very clear, then,^a that subsection (2)(e) is not code language importing better law considerations into the Restatement Second.

Not so clear is whether subsections (2)(b) and (c) of section 6 direct courts to engage in Currie-style interest analysis, the crux of which is recognition of false conflicts through a determination that, usually, a state only territorially involved is not interested in having its law apply to a dispute—that is, the lawmaker acts chauvinistically and intends only domiciliaries of the state to benefit from its law.

Section 6(2)(b) directs the court, in formulating a center of gravity using contacts collected under sections 145 or 188 or in determining if a territorially-based presumption of applicability created by one of several other sections can be overcome, to look to the "relevant policies of the forum."⁷¹ Subsection (2)(c) even employs the code word of Professor Currie's system in calling for examination of the policies of "interested states," and a comment to that subsection makes clear that the forum's own policies are pertinent only if the forum is also "interested."⁷²

A further comment directed to subsection (2)(b) says that it requires the forum to decide if the purposes of its law "would be furthered by its application to out-of-state facts."⁷³ This may imply that the forum

68. RESTATEMENT (SECOND) § 6(2)(e).

69. See RESTATEMENT (SECOND) § 6 comment h.

70. See *infra* text accompanying notes 206-230, relating Minnesota's choice of law experience under the better law method.

71. RESTATEMENT (SECOND) § 6(2)(b).

72. For the complete text of subsection (2)(c), see *supra* note 65. Comment e to § 6 states that after examining its own policies, the forum is to consider those of "all other interested states," making clear that there is an assumption that the forum is "interested" when it examines its own policies under subsection (2)(b). Additionally, comment e states that "where the state of the forum has no interest in the case apart from the fact that it is the place of the trial," its only relevant policies relate to procedural matters.

73. RESTATEMENT (SECOND) § 6 comment e. The closest thing associated with § 6 to a Currie-style interest analysis is this final comment to section 6(2)(c), concerning the policies of interested states other than the forum:

The content of the relevant local law rule of a state may be significant in determining whether this state is the state with the dominant interest. So, for example, application of a state's statute or common law rule which would absolve the defendant from liability could hardly be justified on the basis of this state's interest in the welfare of the injured plaintiff.

RESTATEMENT (SECOND) § 6 comment f. But this does not say that the 'interest' in the plain-

should rely on some reason other than mere territorial connection to an issue as the basis for application of its law. But other comments plus the overall theory of the rest of the Restatement Second are inconsistent with construing 'interest' as Brainerd Currie construed it,⁷⁴ so that a state only territorially involved is not interested. Thus, the comment to subsection (2)(c), concerning policies of interested states other than the forum, says: "[I]f a husband injures his wife in a state other than that of their domicile, it may be that the state of conduct and injury has the dominant interest in determining whether the husband's conduct was tortious or whether the wife was guilty of contributory negligence."⁷⁵ And in the chapter of the Restatement Second on torts, the comments declare that when the torts at issue are "alienation of affections and criminal conversation, the state where the conduct took place may be the state of dominant interest" without regard to the domiciles of the parties.⁷⁶ Likewise, in the typical personal injury case, "the state where the injury occurred . . . may have the greater interest in the matter."⁷⁷

In the field of contracts, a comment in the Restatement Second announces that the state where the contract was negotiated and the state of performance have "an obvious interest" in applying their law on numerous issues without regard to any domiciliary connection to the dispute.⁷⁸ Only on selected issues does the Restatement Second confine 'interest' to a domiciliary state. One is spousal and parental immunity in tort, in

tiff arises out of domiciliary status. In context it appears to arise out of a territorial connection, for example, the accident or the tortious conduct occurred there.

74. See his classic statement concerning the chauvinistic law-maker in his analysis of the facts of *Milliken v. Pratt*, 125 Mass. 374 (1878), in Currie, *Married Women's Contracts*, *supra* note 15, at 232-34 [83-85]. The protective policy of Massachusetts extended to what married women, he asked? "Why, those with whose welfare Massachusetts is concerned, of course—i.e., Massachusetts married women." *Id.* at 234 [85.] In that article, Currie assumed, without deciding, that the connecting factor would be residence rather than domicile. In most instances in which it has actually made a difference whether domicile or residence was the connecting factor, however, domicile has been used as the test by courts employing interest analysis. See *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969), concerning two New York domiciliaries apparently residing in Michigan for an anticipated four years while attending college. New York was said to have a "grave concern" for the injured "Tooker, a New York domiciliary." *Id.* at 577, 249 N.E.2d at 398, 301 N.Y.S.2d at 525.

75. RESTATEMENT (SECOND) § 6 comment f.

76. *Id.* § 145 comment c. Unquestionably, Brainerd Currie would not have applied the law of the place of conduct if the law of the domicile(s) of plaintiff and defendant had a contrary rule either allowing or not allowing the action.

77. *Id.* The omitted words are: "which is often the state where the plaintiff resides." *Id.* Obviously, the Restatement Second does not consider this domiciliary status necessary to the creation of an interest on behalf of the state where the injury occurred.

78. *Id.* § 188 comment e.

which the applicable law will "usually" be that of the common domicile.⁷⁹ Another domiciliary reference is made in the Restatement Second to a guest statute defense in tort, but here again there is a qualification quite inconsistent with interest analysis theory:

[T]he circumstances under which a guest passenger has a right of action against the driver of an automobile for injuries suffered as a result of the latter's negligence may be determined by the local law of their common domicile, if at least this is the state from which they departed on their trip and that to which they intended to return⁸⁰

Domiciliary reference in the area of contracts also is well hedged with qualification. "Usually" if a contract is valid under the law of an objecting party's domicile, it will be enforced.⁸¹ On the other hand, an illustration in the Restatement Second depicts a situation in which this domicile's law does not control.⁸²

Before section 6 entered the Restatement Second in the 1967 Proposed Official Drafts, there could have been no doubt that the method underlying the various sections was policy neutral and jurisdiction selective. That is, the state whose law was applied was determined without considering whether it imposed liability or favored the defendant.⁸³

With respect to torts, for example, before section 6 came into use, to determine whether the appropriate center of gravity was the place of injury or place of conduct of the alleged tortfeasor, the forum decided for itself whether it was dealing with an admonitory tort, which would take it

79. *Id.* § 169(2). A number of decisions purporting to use *lex loci* methodology had restructured the traditional rule—the first Restatement rule that used place-of-injury law to determine family immunity (*see* RESTATEMENT OF CONFLICT OF LAWS § 388 (1934) [hereinafter cited as RESTATEMENT]) (defenses in tort governed by law of place of injury)—to characterize the immunity issue as primarily a family law matter with reference to the state of domicile. *E.g.*, *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955); *Haumschild v. Continental Casualty Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959). Even under the first Restatement, the forum in a tort case would have made a domiciliary reference to determine if the alleged spouses were indeed lawfully married and would not have looked solely to the law of the place of injury. RESTATEMENT § 132. The first Restatement made a domiciliary reference for almost all matters relating to family law besides family immunity in tort. *See id.* §§ 138 (legitimacy), 142 (validity of adoption), 146 (child custody), 149 (guardianship), 289-290 (marital property rights), and 300-303, 306 (succession to personal property at death). Thus, § 169 of the Restatement Second is a relatively minor adjustment in territorial thinking about choice of law compared to the first Restatement, not a reflection of interest analysis methodology.

80. RESTATEMENT (SECOND) § 145 comment d.

81. *Id.* § 198.

82. *Id.* Illus. 2.

83. *See, e.g.*, Weintraub, *The Contracts Proposals*, *supra* note 43, at 724. *See also id.* at 723-24, opining that what is now § 188 of the Restatement Second would not allow any use of Currie-style interest analysis. Accord Sedler, *Contracts Provisions*, *supra* note 43.

to place of conduct, or a compensatory tort, which would lead it to place of injury.⁸⁴ Only after choosing the appropriate jurisdiction would this choice of law process reveal what the law was, that is, whether the apparent tort was to be recognized by the governing law.

Sections 6(2)(b) and (c) seem to anticipate that the forum court, having determined a presumptive governing law based on the territorial approaches in the various subsequent sections of the Restatement Second dealing with particular causes of action and issues, may, upon examination of the "relevant policies" of interested states, reject that tentative or presumptive governing law in favor of a different solution.⁸⁵ But it is impossible to determine what the relevant policies are under the methodology of Brainerd Currie without changing the meaning of "interested state"⁸⁶ from that of a state territorially involved, as intended by the drafters of the Restatement Second, to a state with a domiciliary connection to the dispute, which is usually necessary to generate 'interest' under Currie's theories. In sum, what policy is 'relevant' is to be determined under territorialist thinking about the choice of law process, not under interest analysis.

Personally, I do not think Professor Reese intended section 6 to diminish in any way the focus on territorialism underlying his 'most significant relation' method. I consider section 6 a sop tossed in 1967 to members of the American Law Institute who were unhappy with a purely territorial methodology.⁸⁷ Examination of the five factors enumerated in section 6 in addition to the policy of the interested forum and the other interested states shows that many are almost silly and will never have any influence on the outcome of the choice of law process under the Restatement Second.⁸⁸

84. RESTATEMENT (SECOND) § 379 comment c (Tent. Draft 1963).

85. See *supra* note 65 and text accompanying notes 68-73.

86. See *infra* text accompanying note 145.

87. It must be conceded, though, that the material in § 6 is traceable to an earlier writing of Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROBS. 679, 689 (1963) [hereinafter cited as Reese, *Conflict of Laws*].

88. See *Sabell v. Pacific Intermountain Express Co.*, 36 Colo. App. 60, 536 P.2d 1160, 1164 (1975) (only pertinent factors in § 6(2) are subsections (b) and (c)); *Griggs v. Riley*, 489 S.W.2d 469, 473 (Mo. App. 1972) (only subsections (b) and (c) of § 6 are significant).

Many decisions employing the Restatement Second's methodology just ignore § 6. See, e.g., *First Nat'l Bank v. Rostek*, 182 Colo. 437, 514 P.2d 314, 320 (1973) (relying solely on § 145); *Rose v. Port Auth.*, 61 N.J. 129, 293 A.2d 371, 377 (1972) (§§ 145, 146); *White v. White*, 618 P.2d 921, 924 (Okla. 1980) (court quoted § 145 factors). In other cases, courts allude to § 6, but it has no effect on the outcome of the case; the courts actually use a center of gravity approach found solely under §§ 145 and 188 or a presumptive territorial reference under the sections following §§ 145 and 148. E.g., *Doyle v. United States*, 530 F. Supp. 1278, 1285 (C.D. Cal. 1982) (§ 145 applied territorially despite reference to § 6); *R & L Grain Co. v. Chicago E. Corp.*, 531 F. Supp. 201, 204-05 (N.D. Ill. 1981) (§ 6 factors did not displace

Consider the first factor—the needs of the interstate system.⁸⁹ Presumably this calls for use of a choice of law method that fairly and reasonably selects a substantive rule; a strong bias in favor of forum law is to be shunned. If one believes in flexible territorialism, as do the drafters of this Restatement, he would want to apply section 145, 188, or any of the other sections according to their terms, since this will assure respect for other states' involvement in the case. Since the Restatement Second is not forum-biased in its methodology, applying its provisions as they existed in the tentative drafts before section 6 was confected will assure that the "needs of the interstate and international systems" are met.⁹⁰

Equally silly as a section 6 consideration is the sixth, "certainty, predictability and uniformity of result."⁹¹ Application of the new flexible, territorial method under the tentative drafts before section 6 was added would have tended to assure certainty and predictability of result. Clearly, if all jurisdictions had adopted that method, there would have been uniformity. It is the vague section 6, with the uncertainty it creates concerning the role of state interests, that removes the certainty and predictability. Sticking to a flexible center of gravity analysis is what will

reference to place of injury); *Moss v. Nat'l Life & Accident Ins. Co.*, 385 F. Supp. 1291, 1296-99 (W.D. Mo. 1974) (§ 6 factors did not overcome § 192 presumption); *Wood Bros. Homes v. Walker Adjustment Bureau*, 198 Colo. 444, 601 P.2d 1369, 1373 (1979) (§ 196 presumption not overcome by § 6 factors); *State ex rel. Broglin v. Nangle*, 510 S.W.2d 699, 704 (Mo. 1974) (§ 6 factors did not overcome § 175 presumption); *National Starch & Chem. Corp. v. Newman*, 577 S.W.2d 99, 103-04 (Mo. App. 1979) (center of gravity found under § 188; § 6 cited but its factors not analyzed). See also *In re Air Crash Disaster*, 644 F.2d 594, 616 (7th Cir.), cert. denied sub nom. *Lin v. American Airlines, Inc.*, 454 U.S. 878 (1981) (territorial reference not overcome when analysis showed domiciliary states had equal interests and conflicting laws).

Outside the jurisdictions that construe § 6 as calling for recognition of Currie-style false conflicts (see *supra* text accompanying note 64 and *infra* text accompanying notes 101-104), there are very few cases in which § 6 has affected the outcome. See *Griggs v. Riley*, 489 S.W.2d 469 (Mo. App. 1972); *Estate of Lenherr*, 455 Pa. 225, 314 A.2d 255 (1974) (classic case of twisting choice of law analysis to get the better law applied); *Johnson v. Spider Staging Corp.*, 87 Wash. 2d 577, 555 P.2d 997 (1976); cf. *Shasta Livestock Auction Yard, Inc. v. Bill Evans Cattle Management Corp.*, 375 F. Supp. 1027, 1032 (D. Idaho 1974) (§ 6 applied on the theory that no other section of the Restatement Second related to the agency issue presented).

89. RESTATEMENT (SECOND) § 6(2)(a).

90. *Id.*

The first factor, the needs of the interstate and international system, seems largely irrelevant when a court attempts to apply the law of the state with the most significant relationship. Regardless of which state's law is applied, the needs of the interstate system will be promoted because that state will be the most interested and have the most significant relationship to the parties' transaction.

Shasta Livestock Auction Yard, Inc. v. Bill Evans Cattle Management Corp., 375 F. Supp. 1027, 1033 (D. Idaho 1974).

91. RESTATEMENT (SECOND) § 6(2)(f).

best implement the sixth consideration.⁹²

This is also true for the seventh factor: "ease in the determination and application of the law to be applied."⁹³ Determination is easier without section 6, under a system sticking to territorial considerations unmixed with phantomlike state interests. As for ease in application, any choice of law method can end up choosing a substantive law that is complex and hard to apply. Surely if the court believes it is using the appropriate methodology, it will not abandon it in a particular case because the law chosen—such as a complex no-fault statutory scheme from a sister state—raises some difficult problems.⁹⁴

That leaves the fourth and fifth factors: "protection of justified expectations"⁹⁵ and "the basic policies underlying the particular field of law."⁹⁶ The latter factor, it has been shown,⁹⁷ is the crux of the flexibility of the new territorially based system. It requires the court, for example, to determine if a particular tort is admonitory, so that the place of conduct assumes great importance in finding the center of gravity. The comments also indicate that in contract cases, the basic policies give a boost to finding a territorial reference that will validate the protection of justified expectations, just as the fourth factor does.⁹⁸

In sum, apart from the two considerations relating to state policies, section 6 adds nothing to the balance of the Restatement Second since the sections included in the tentative draft—onto which section 6 was subsequently affixed—had already provided a bias in favor of making a choice of law that would validate a contract.⁹⁹ This same bias had been a gloss

92. "Application of the law of the state with the most significant relationship likewise will lead to uniformity of results. The law of the most interested state will always be applied to the determination of the outcome of the controversy." *Shasta Livestock Auction Yard, Inc. v. Bill Evans Cattle Management Corp.*, 375 F. Supp. 1027, 1033 (D. Idaho 1974). *Accord Doyle v. United States*, 530 F. Supp. 1278 (C.D. Cal. 1982) (certainty best achieved by staying with law selected territorially).

93. RESTATEMENT (SECOND) § 6(2)(g).

94. *See Brinkley & West, Inc. v. Foremost Ins. Co.*, 499 F.2d 928, 935 (5th Cir. 1974).

95. RESTATEMENT (SECOND) § 6(2)(d).

96. *Id.* § 6(2)(e).

97. *See supra* text accompanying note 51.

98. RESTATEMENT (SECOND) § 6 comments g, h. *See also* Reese, *Conflict of Laws, supra* note 87, at 689 (policy of contracts law is "that promises should be performed"). Reese also said that the "underlying policies" factor "can be of no assistance" in tort conflicts cases. *Id.* at 690.

99. In many instances, what is now § 187 of the Restatement Second enabled the parties to choose expressly in the contract a law that would validate the contract. *See also* § 203 (departing from normal center of gravity analysis to favor finding a law that will uphold an allegedly usurious interest rate). In the tentative draft notes to the predecessor of present § 188, the same bias in favor of applying a validating law appeared that now emanates from § 6. *E.g.*, "[T]he courts will be inclined to apply a law which would uphold the entire contract or a provision thereof in preference to one under which the contract, or particular provision,

on the *lex loci* method in many jurisdictions long before work on the Restatement Second began.¹⁰⁰

Notwithstanding the rather clear case that can be made that sections 6(2)(b) and (c) did not adopt Currie-style interest analysis,¹⁰¹ a number of jurisdictions purporting to apply the most significant relationship methodology of the Restatement Second have discussed interests of involved states in Currie-esque fashion. That is, a state is not interested because of territorial involvement but because its law benefits a domiciliary of the state.¹⁰²

By reading Currie-style interest analysis into the Restatement Second, some jurisdictions¹⁰³ seem to have converted its 'most significant relation'

would be invalid." RESTATEMENT (SECOND) § 332b comment b (Tent. Draft No. 6 1961).

100. See *Pritchard v. Norton*, 106 U.S. 124 (1882).

101. See Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L LAW 280, 295 (1982) (§ 6 "unabashedly territorial in its assumptions").

102. See, e.g., *Griggs v. Riley*, 489 S.W.2d 469 (Mo. App. 1972). The Missouri court, after stating that it was applying § 6(2)(b) and (c), promptly said: "Missouri has an interest in protecting the rights of Missouri residents" *Id.* at 473.

See also *In re Air Crash Disaster*, 644 F.2d 594, 617 (7th Cir.), *cert. denied sub nom. Lin v. American Airlines, Inc.*, 454 U.S. 878 (1981) ("New York does have a definite interest in protecting its residents from excessive liability"); *R & L Grain Co. v. Chicago E. Corp.*, 531 F. Supp. 201, 206 (N.D. Ill. 1981) (Illinois interested in protecting "an Illinois resident" defendant; Wisconsin interested in "resident plaintiffs"); *DeRoburt v. Gannett Co.*, 83 F.R.D. 574, 578 (D. Hawaii 1979) (§ 6 requires "interest-oriented choice of law analysis"); *Moss v. National Life & Accident Ins. Co.*, 385 F. Supp. 1291, 1299 (W.D. Mo. 1974) (Missouri interested in applying its law because it was favorable to Missouri domiciliaries); *Nelson v. Aetna Life Ins. Co.*, 359 F. Supp. 271, 296 (W.D. Mo. 1973); *State ex rel. Broglin v. Nangle*, 510 S.W.2d 699, 703 (Mo. 1974) (Missouri not interested in applying its law of limited liability to benefit Texas-based railroad); *Johnson v. Spider Staging Corp.*, 87 Wash. 2d 577, 583, 555 P.2d 997, 1002 (1976) (Kansas interested in applying prodefendant law only in favor of Kansans); *Potlatch No. 1 Fed. Credit Union v. Kennedy*, 76 Wash. 2d 806, 812, 459 P.2d 32, 36 (1969) (Washington interested in protecting Washington domiciliaries). *Cf. Jagers v. Royal Indem. Co.*, 276 So. 2d 309, 311-12 (La. 1973) (adopting interest analysis as the appropriate methodology but citing § 6 as if it included the principles of interest analysis); Maier, *supra* note 101, at 287 (§ 6 contains elements on which interest analysis is built).

103. *Sabell v. Pacific Intermountain Express Co.*, 36 Colo. App. 60, 536 P.2d 1160, 1164 (1975); *Brickner v. Gooden*, 525 P.2d 632 (Okla. 1974) (without specific reliance on § 6(2)(b) and (c)); *cf. Murphy v. Colorado Aviation, Inc.*, 41 Colo. App. 237, 240, 588 P.2d 877, 880 (1978) (construing *Sabell* as calling for interest weighing). Such eclecticism seems to be imputed to Illinois, which says it abides by the Restatement Second methodology, in *In re Air Crash Disaster*, 644 F.2d 594 (7th Cir.), *cert. denied sub nom. Lin v. American Airlines, Inc.*, 454 U.S. 878 (1981). Michigan recently modified its *lex loci* approach to achieve somewhat the same interest analysis and territorial mixture. *Sexton v. Ryder Truck Rental, Inc.*, 413 Mich. 406, 432-33, 320 N.W.2d 843, 854 (1982) (Michigan law will apply if all the parties involved in a tort are from Michigan).

Sedler, *Rules*, *supra* note 7, at 1000-11, lists Mississippi and Iowa, in addition to Illinois, as states that have adopted the Restatement Second methodology but that employ it in a

method into an eclectic hybrid. In the case in which all parties hail from the same state, the common domicile is—because Currie's method is used—the place of the most significant relation. It is unclear what the court would do if the domicile of plaintiff and defendant were different but the laws of each were the same, and both were contrary to the law of the state that was the center of gravity. The court probably would use the law of one of the domiciliary states. In all other situations, the center of gravity will be applied without the intrusion of Currie-style interest analysis. This hybrid method attained by construing section 6 is essentially the same thing New York has reached by a different route: starting with interest analysis as the foundation but deciding to break true-true and true-disinterested conflicts territorially.¹⁰⁴

To this extent—and to the extent that Currie's view of the 'interested' state is employed in Restatement Second jurisdictions dealing with section 6 in cases that do not present false conflicts—the Restatement Second has produced eclecticism. In the main, however, it is a purely territorial method.

III. ECLECTICISM IN MODERN CHOICE OF LAW METHODOLOGY OTHER THAN RESTATEMENT SECOND

This portion of this Article examines the nature and extent of eclecticism in the choice of law methodology of seven states that have been in the forefront of the development of approaches based on more than territorialism or factors other than territorialism. In each of these states the appellate courts, at least at various periods of development of their methodology, have done more than read and try to apply the Restatement Second. They have experimented with other theories and approaches, primarily with interest analysis and better law.

A. California

The California Supreme Court began searching for a 'modern' choice of law method early: in 1953 with *Grant v. McAuliffe*.¹⁰⁵ At issue was the survival of a tort action involving Californians in an accident in Arizona. The opinion began in *lex loci* fashion¹⁰⁶ but then concluded that Califor-

manner that always recognizes what interest analysis supporters term 'false conflicts.'

104. See *infra* text accompanying notes 151-174. See also the apparent Pennsylvania hybrid discussed *infra* in text accompanying notes 191-205.

105. 41 Cal. 2d 859, 264 P.2d 944 (1953).

106. The opinion is replete with classic examples of what R. CRAMTON, D. CURRIE & H. KAY, *supra* note 15, at 63, call "escape devices" and which I call 'cheating' on the first Restatement. First, the court in *Grant* characterized the survival issue as one of procedure; alternatively, the court said, it was a "question . . . of the administration of decedent's

nia law should apply because "all of the parties were residents of this state."¹⁰⁷ After several other limited departures from *lex loci*,¹⁰⁸ the California Supreme Court expressly repudiated the *lex loci* method in *Reich v. Purcell*¹⁰⁹ and seemed to adopt some form of interest analysis.¹¹⁰ It was the domicile of the parties involved in an accident, not the place of the

estates." 41 Cal. 2d at 866, 264 P.2d at 949. Of course, Beale had classified survival as a matter of tort law and applied the law of the place of injury. RESTATEMENT § 390.

Such gross cheating on the first Restatement by a court supposedly employing the *lex loci* method is usually a sure sign that the jurisdiction is soon to abandon expressly the *lex loci* for some modern method. This happened not only in California but also in New York. There could be no more clear case of cheating on the substance versus procedure classification process of *lex loci* than was evident in *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) (measure of damages is procedural). Two years later *lex loci* was thrown out by *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). See also *Haumschild v. Continental Casualty Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959) (spousal immunity in tort not matter of tort but of status law), spawning *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965) (*lex loci* expressly repudiated). But see *University of Chicago v. Dater*, 277 Mich. 658, 270 N.W. 175 (1936) (the classroom favorite employing *renvoi* in a contract case to cheat on the result dictated by the first Restatement and not leading to any substantial choice of law revolution in Michigan until 1982). See *supra* note 103.

The author of the *Grant* majority opinion, Justice Traynor, has conceded that he intended it to be a transitional case that would lead to adoption of a modern approach to choice of law. Traynor, *Brainerd Currie—Five Tributes*, 1966 DUKE L.J. 9, 11 (1966); Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 670 n.35 (1959).

107. 41 Cal. 2d at 867, 264 P.2d at 949.

108. See *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961); *People v. One 1953 Ford Victoria*, 48 Cal. 2d 595, 311 P.2d 480 (1957); *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955).

109. 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

110. *Reich* was a false conflict (the two domiciliary states, Ohio and California, had no limit on damages), so the court had no occasion to comment on what device it would use to break true conflicts. The numerous commentators on *Reich* understood the decision to adopt interest analysis. See Symposium, *Comments on Reich v. Purcell*, 15 U.C.L.A. L. REV. 551, 551-654 (1968).

The court in *Reich* did, however, settle one significant aspect of interest analysis that has been troublesome elsewhere: the appropriate time of interest in a tort case. Interest was frozen at the time of the tort; a party's subsequent change of domicile could not give his new home state an interest. 67 Cal. 2d at 555-56, 432 P.2d at 730, 63 Cal. Rptr. at 34.

Although most courts agree that such a rule is necessary to prevent law-shopping, see *Gore v. Northeast Airlines, Inc.*, 373 F.2d 717, 723 (2d Cir. 1967), there is some contrary authority that a bona fide post event change of domicile triggers a change in the interested states. See *Huff v. LaSieur*, 571 S.W.2d 654 (Mo. App. 1978); *Miller v. Miller*, 22 N.Y. 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968) (alternative holding); see also *Allstate Ins. Co. v. Hague*, 289 N.W.2d 43 (Minn. 1979), *aff'd*, 449 U.S. 302 (1981). Apparently in the jurisdictions that do not freeze the time of interest, a party harmed in the choice of law process by the change of domicile can raise a fact question in the litigation concerning the bona fides of the move. There is no suggestion in the cases of whether this would be an issue for the jury; I assume that it would not be.

accident, that was controlling in selecting the law governing the amount of wrongful death damages recoverable.¹¹¹

The next significant California Supreme Court decision, *Hurtado v. Superior Court*,¹¹² contains much dicta casting considerable doubt on whether interest analysis was still California's choice of law methodology. The plaintiffs and plaintiffs' decedent were domiciliaries of Zacatecas, Mexico, and the defendant was a Californian.¹¹³ It was a classic zero-interest or true-disinterested conflict.¹¹⁴ Zacatecas law, which limited wrongful death damages, was highly unfavorable to its domiciliary plaintiffs. Likewise, California's unlimited damages rule harmed its domiciliary defendant. The court reaffirmed that *Reich* had adopted interest analysis. In true Currie fashion, the court then declared that forum law would be employed to break true conflicts: "In the case at bench, California as the forum should apply its own measure of damages for wrongful death, unless Mexico has an interest in having its measure of damages applied."¹¹⁵ Then, however, the court "deem[ed] it advisable" to go on at great length in dictum about how interests are to be established.¹¹⁶ Quite logically, the defendant had assumed that California, as well as Zacatecas, had no interest. The court said, however, that California, as the place of the accident, had an interest in deterring negligent conduct, and that it was "abundantly clear" that the threat of having to pay unlimited damages would make drivers in California proceed more safely.¹¹⁷

111. The defendant was described as "a resident and domiciliary of California"; the victims, said the court, "resided in Ohio" when the accident occurred; the survivors thereafter "became permanent residents" of California. 67 Cal. 2d at 552, 432 P.2d at 728, 63 Cal. Rptr. at 32. But at the time of the accident "plans to change the family domicile" were not fixed. *Id.* at 555, 432 P.2d at 730, 63 Cal. Rptr. at 34. The opinion discussed *Grant*, which employed the residence rather than domicile concept, as if it were an interest analysis decision. The last word on this in *Reich* itself is that "a defendant cannot reasonably complain when compensatory damages are assessed in accordance with the law of his domicile." *Id.* at 556, 432 P.2d at 731, 63 Cal. Rptr. at 35. Apparently the court in *Reich* did not see any difference in the concepts of domicile and residence. Cases will arise, however, in which the outcome will turn on whether domicile or residence is the connecting factor used. *See infra* note 146.

112. 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974).

113. The court stated that the parties were "residents and domiciliaries" of their respective states, 11 Cal. 3d at 574, 522 P.2d at 668, 114 Cal. Rptr. at 108; hence *Hurtado* is no help in resolving the question of whether, in California's brand of interest analysis, residence or domicile is the critical connecting factor.

114. *See* Weintraub, *Principles*, *supra* note 13, at 153.

115. 11 Cal. 3d at 580, 522 P.2d at 670, 114 Cal. Rptr. at 110.

116. *Id.* at 583, 522 P.2d at 671, 114 Cal. Rptr. at 111.

117. *Id.* at 584, 522 P.2d at 672, 114 Cal. Rptr. at 112. This is just preposterous, as many others have observed. *See, e.g.,* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 6.23 at 319 (2d ed. 1980) [hereinafter cited as WEINTRAUB, COMMENTARY]; Juenger, *supra* note 1, at 419; *see also* Martin, *The Constitution and Legislative Jurisdiction*, 10

This asserted interest by the place of injury in deterring negligent conduct by imposing high damages is not an altruistic interest since the prime beneficiaries of the deterrence will be domiciliaries using the local roadways. It does, however, preclude a false conflict in any tort case when the place of injury has a prorecovery law. California's interest would have been the same had the driver, as well as the victim, been from Zacatecas. But that is supposed to be a false conflict, I assume.

The court in *Hurtado* then went on to analyze the interests in *Ryan v. Clark Equipment Co.*¹¹⁸ An Oregon resident was killed in Oregon on the job by an alleged equipment failure. His heirs sued the manufacturer, a Michigan corporation. Oregon limited wrongful death damages; Michigan

HOFSTRA L. REV. 133, 134 (1981). First of all, the driver probably has no idea about the law of damages; certainly he has no reason to think that if he were negligent, the person he would kill might hail from a jurisdiction that limits wrongful death damages. The driver probably has never heard of the concept of limited wrongful death damages. Second, the driver, if he thinks about damages at all, undoubtedly assumes that his insurance company will cover his liability. Third, the chances are that if the driver negligently causes an accident, other parties will be merely injured rather than killed, and very few jurisdictions limit damages when there is injury rather than death. Fourth, and most important, it is fear for his own safety that will make the driver eschew negligence. If a speeding driver, for example, is not deterred from such reckless conduct by the chances of his own injury or death, the very remote possibility that he might kill someone else and be subjected to liability in excess of his insurance coverage certainly will not deter him.

I am amused that the court in *Hurtado* considered it 'abundantly' clear that the foregoing analysis concerning deterrence was wrong. It is my theory that such an inappropriate adverb slips into the opinion because the writer knows perfectly well that what he is saying will be rejected by most; hence the writer should indicate a high degree of acceptance of the dubious proposition in the hopes of forestalling criticism. Another wonderful example of this use of the inappropriate adverb is the following from Justice Brennan's opinion in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 315 (1981) (emphasis added):

If Mr. Hague had only been injured and missed work for a few weeks, the effect on the Minnesota employer would have been palpable and Minnesota's interest in having its employee made whole would be evident. Mr. Hague's death affects Minnesota's interest *still more acutely*, even though Mr. Hague will not return to the Minnesota workforce. Minnesota's work force is *surely* affected by the level of protection the State extends to it, either directly or indirectly.

Indeed. Probably, each Minnesota employer passed out leaflets explaining how Ralph Hague's widow got \$45,000 rather than \$15,000 from his insurance company after he died, in order to spur on the Minnesota workers to increase their productivity.

Or how about the passage in *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972), concerning the Ontario guest statute, announcing that this "legislation [was] *obviously* addressed, *at the very least*, to a resident [of Ontario] riding in a vehicle traveling within its borders." *Id.* at 126, 286 N.E.2d at 456, 335 N.Y.S.2d at 68 (emphasis added). What is the message obviously addressed to the guest? Apparently something like: "Now don't you be ungrateful and sue the driver, even if you have been severely injured by his negligence and he is insured. You act like a nice guest."

118. 268 Cal. App. 2d 679, 74 Cal. Rptr. 329 (1969).

did not. Clearly, this was a zero-interest or true-disinterested conflict.¹¹⁹ The court in *Hurtado*, however, twisted the interests to make it true-true. Oregon was interested in protecting the Michigan corporation because it did business in Oregon. "Michigan had an interest in applying its rule of compensation without limitation as to amount to all who committed tortious conduct within that state"¹²⁰ Plainly, this dictum recognized altruistic interests attributed to both states.¹²¹

Under this type of approach a false conflict could never exist. The state involved in a dispute territorially would always want to cast the benefit of a prodefendant law on the out-of-state defendant and that of a proplaintiff law on an out-of-state plaintiff.¹²² If every state that can constitutionally have its law applied has an 'interest,' California should stop confusing bench and bar by going through the needless step of analyzing interests.¹²³

Hurtado was followed by *Bernhard v. Harrah's Club*,¹²⁴ in which the court implicitly overruled that portion of *Hurtado* that had adopted Brainerd Currie's device for breaking true conflicts: application of forum law. *Bernhard* was a typical true-true conflict. The California plaintiff prevailed under California tort law, and the Nevada defendant was not liable under the law of its home state.¹²⁵ The *Hurtado* approach to resolving true-true conflicts—applying forum law *a la* Currie—was not mentioned. Instead, *Bernhard* held that true-true conflicts would be resolved by a "comparative impairment" analysis.¹²⁶ Under this approach, the

119. See Sedler, *Weintraub's Commentary on the Conflict of Laws: The Chapter on Torts*, 57 IOWA L. REV. 1229, 1231-32 (1972).

120. 11 Cal. 3d at 585, 522 P.2d at 673, 114 Cal. Rptr. at 113. The rest of the quote is as follows: ". . . but particularly to resident defendants, in order to deter such conduct." *Id.* (emphasis added). Note the inappropriate adverb once again. "You are a Michigan domiciliary so we, the lawmakers of Michigan, especially want you to pay people you injure, but if you were from Indiana committing the same tort here in Michigan we wouldn't care as much about making you pay in full."

121. There was no suggestion that the defendant corporation was assigned to Oregon for interest analysis purposes because it had a branch operation in that state through which it became involved in the litigation, that is, a 'locus' as that concept was subsequently developed in *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978). See *infra* text accompanying notes 131-150.

122. See Ely, *supra* note 12, at 176-78; J. MARTIN, *CONFLICT OF LAWS* 243 (1978).

123. I.e., the California courts can leap to the 'comparative pertinence' (a.k.a. better law) device for breaking the conflict among all states whose law can apply constitutionally. See *supra* text accompanying notes 131-150.

124. 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U.S. 859 (1976).

125. *Bernhard* described these parties as residents of their respective states rather than domiciliaries. 16 Cal. 3d at 318, 546 P.2d at 722, 128 Cal. Rptr. at 128.

126. This term was coined by Professor Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 21 (1963). Apparently Baxter intended it to be a distinct methodology (replacing Currie's notion of true versus false conflicts). But its sole use today is as a break

court should "determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state."¹²⁷ The court specifically stated that comparative impairment was not to be confused with the better law break device.

The court in *Bernhard* then misapplied comparative impairment to permit recovery. Nevada's interest in protecting this class of defendants, tavern keepers, from what Nevada considered to be unfair liability for injuries caused by persons becoming drunk at the tavern would have been sacrificed one hundred percent by the application of California's law imposing liability. But California's interest in seeing a California tort victim receive compensation would not have been wholly sacrificed by the application of Nevada law, since the victim already had a cause of action against the drunk tortfeasor or could recover against his own insurer if the drunk had no liability insurance.¹²⁸ To have deprived the California victim of a second bite at the compensation apple¹²⁹ would not have fully defeated California's interest.¹³⁰

device within an interest analysis methodology. See Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CAL. L. REV. 577, 614 (1980); Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 COLUM. L. REV. 946, 949-50 (1981).

127. 16 Cal. 3d at 320, 546 P.2d at 723, 128 Cal. Rptr. at 219. It should be observed that comparative impairment cannot be used as a device to break true-disinterested or zero-interest conflicts, which constitute 50% of all true conflicts, as noted above, *see supra* text accompanying note 19 and *infra* notes 128-131 and accompanying text. In this situation neither state has an interest to be impaired.

128. See Calif. Ins. Code § 11580.2 (West Supp. 1982).

129. See *Duarte v. McKenzie Constr. Co.*, 152 Cal. Rptr. 373, *opinion deleted*, 89 Cal. App. 2d 133 (1979). While working for a subcontractor, a California plaintiff was injured in Nevada by the negligence of the prime contractor, a Nevada company. Under Nevada law plaintiff's sole remedy was workmen's compensation benefits. Under California law receipt of such benefits did not bar a suit for additional recovery from the negligent tortfeasor. The court held that California's interest would not be substantially impaired if Nevada law were applied because the California domiciliary plaintiff "has already received workers' compensation benefits . . ." 152 Cal. Rptr. at 379. The court purported to distinguish *Bernhard* on the theory that "[t]he plaintiff in *Bernhard* would have been without any compensation for his injuries" if Nevada law had been applied there. Surely this is not the case.

See also WEINTRAUB, COMMENTARY, *supra* note 117, § 6.24, at 324, criticizing *Bernhard's* misuse of the comparative impairment break device.

130. *Bernhard* was quite rare in presenting facts in which the comparative impairment approach would point the way to breaking a true-true conflict. Usually denying recovery to a plaintiff completely sacrifices the interest of his home state, while imposing damages completely sacrifices the protective interest of the defendant's domicile. Cf. Horowitz, *The Law of Choice of Law in California: A Restatement*, 21 U.C.L.A. L. REV. 719, 752-53 (1974) (comparative impairment can break the true conflict in "some cases"; Horowitz proposes additional break devices).

Comparative impairment will always dictate adoption of only partially protective prodefendant laws. For example, a limitation on damages in wrongful death existing in the

That portion of *Bernhard* that employed comparative impairment to break true-true conflicts was modified in part two years later in *Offshore Rental Co. v. Continental Oil Co.*,¹³¹ the latest word from the California Supreme Court concerning choice of law methodology. In view of the *Hurtado* dictum to the effect that California was not an interest analysis state because altruistic interests were recognized, it is important to observe that the court in *Offshore* did employ the Currie-esque concept of the chauvinistic lawmaker in assigning interests. Louisiana's prodefendant law was implicated because defendant, a Delaware corporation with an operation in Louisiana, was a Louisiana "resident."¹³² California also had "an interest in protecting California employers¹³³ from ec-

defendant's home state assures the plaintiff at least *some* recovery and does not fully wipe out the interest of the plaintiff's state manifested in its unlimited recovery law in favor of compensation; whereas applying the unlimited recovery law of the plaintiff's state will wholly eliminate the protective policies of the defendant's home state.

Consider, too, a case in which defendant's home state requires a finding of negligence for liability on the facts; plaintiff's home state imposes strict liability. If comparative impairment can solve such a conflict (application of either law arguably results in a 100% wipe-out of the other state's interest), it will select the prodefense law, because that at least gives the plaintiff a shot at compensation by proving negligence and arguably does not totally impair the interest of the plaintiff's home state. Application of strict liability, however, would wholly impair the protective interest of the defendant's home state.

In sum, comparative impairment is a highly defendant-oriented device for breaking true-true conflicts in those few instances in which it can provide a solution.

131. 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978).

132. *Id.* at 164, 583 P.2d at 725, 148 Cal. Rptr. at 871.

133. Defendant allegedly had injured a key employee of plaintiff, which was suing derivatively for damages caused by loss of that employee's services.

To me, the most disturbing aspect of *Offshore* is something the commentators have ignored: the inconsistent approach taken by the court in assigning the parties to states for purposes of determining interests. Defendant was a Delaware corporation with its principal place of business in New York. It had an operation in Louisiana, and it was from this "locus," 22 Cal. 3d at 161, 583 P.2d at 723, 148 Cal. Rptr. at 869, that defendant corporation got involved with plaintiff and its key employee, and it was on the premises of the Louisiana 'locus' that the tort occurred. Defendant was assigned Louisiana law by locating it at the branch or division (locus) that got it into the litigation.

Plaintiff was a California corporation with its principal place of business in California. It had a branch office in Texas from which the key employee was operating when he was injured. Although the court said that plaintiff had a Louisiana locus for purposes of the tort involved, 22 Cal. 3d at 161, 583 P.2d at 723, 148 Cal. Rptr. at 869, that is not correct. Louisiana was the place of injury, but the 'locus of the business' involved for plaintiff was its office in Texas. In any event, plaintiff was assigned not to the state of its locus but to California. Apparently that was because California was plaintiff's principal place of business and not because plaintiff was incorporated there, for the court observed that no party had urged application of Delaware law even though Delaware was the state where defendant was incorporated. The parties and the court apparently agreed that a corporate litigant should not, for purposes of interest analysis, be located in a state merely because it is incorporated there. The court, again seeming to agree that Texas was not in the running, also noted that

onomic harm.”¹³⁴ Additionally, the court expressly stated that its choice of law method was “governmental interest analysis” and chastised the trial court for using a “most significant contacts” method.¹³⁵

The court in *Offshore* then announced that the comparative impairment device should be used to break the conflict,¹³⁶ but it never made a comparative impairment analysis.¹³⁷ Instead, the court invented a new conflict-breaking device called comparative pertinence.¹³⁸ The court directed that inquiry be made into whether the law of each state was “archaic,” “obsolete,” in “the ‘main stream,’ ” or “no longer of pressing

no one urged application of Texas law. This makes sense only because of the court’s mistake in treating Louisiana as plaintiff’s ‘locus’ for the case.

Since place of incorporation was apparently deemed irrelevant, what possibly can explain why the court assigned defendant to its locus, Louisiana, but did not assign plaintiff to its locus? Perhaps the place of incorporation is not irrelevant, and the preferred order for locating a corporate defendant is:

1. combined place of incorporation/principal place of business
2. locus
3. principal place of business.

I am unable to hypothesize any other explanation of the assignment of jurisdictions in *Offshore*.

Do note that *Offshore* seems to reject the *Hurtado* dictum (analyzing the *Ryan* facts), which located the manufacturing company both at its principal place of business *and* at the place of injury. The tenor of *Offshore* is that a corporate party should be located in only one state. *Contra In re Air Crash Disaster*, 644 F.2d 594, 620 (7th Cir.), *cert. denied sub nom. Lin v. American Airlines, Inc.*, 454 U.S. 878 (1981) (purporting to apply California choice of law methodology).

134. 22 Cal. 3d at 164, 583 P.2d at 725, 148 Cal. Rptr. at 871.

135. *Id.* at 161, 583 P.2d at 723, 148 Cal. Rptr. at 869. The lower courts sometimes ignore this rejection of modern territorialism. Several courts of appeals decisions still rely on the Restatement Second. *See, e.g., McMullan & Son, Inc. v. United States Fidelity & Guar. Co.*, 103 Cal. App. 3d 198, 162 Cal. Rptr. 720 (1980) (whether there had been accord and satisfaction); *Estate of Klinkner*, 85 Cal. App. 3d 942, 151 Cal. Rptr. 20 (1978) (validity of a trust). Federal courts, too, have imputed the Restatement Second methodology to California despite *Offshore*. *See Sarlot-Kantarjian v. First Pennsylvania Mortgage Trust*, 599 F.2d 915 (9th Cir. 1979) (usury).

Even more surprising are recent California cases employing *lex loci*. *See Tytel v. Tytel*, 131 Cal. App. 3d 119, 182 Cal. Rptr. 238 (1982) (validity of contract—place of making rule mechanically applied with citation to first Restatement); *Estate of Patterson*, 108 Cal. App. 3d 197, 166 Cal. Rptr. 435 (1980) (powers created under testamentary trust; court relied on cases decided when *lex loci* was methodology).

136. 22 Cal. 3d at 166-67, 583 P.2d at 727, 148 Cal. Rptr. at 873.

137. Perhaps the court did not make the analysis because it was so obvious that comparative impairment theory could not resolve the choice of law problem before the court. Applying Louisiana law would wholly defeat California’s procompensation interests; applying California law would wholly defeat Louisiana’s interest in protecting the defendant business entity. Both parties could insure against loss via key man insurance or liability insurance.

138. 22 Cal. 3d at 166, 583 P.2d at 726, 148 Cal. Rptr. at 867.

importance."¹³⁹ This aspect of comparative pertinence is just the better law break device in a readily pierceable disguise.¹⁴⁰ One also examines the "relative commitment of the respective states to the laws involved."¹⁴¹ This is something a bit different, for a state can be very committed to a law that is archaic and out of the main stream,¹⁴² that is, not better.

After the so-called comparative pertinence analysis in *Offshore* the opinion shifted surprisingly¹⁴³ to territorialism: "The accident in question occurred within Louisiana's borders; although the law of the place of the wrong is not necessarily applicable law for all tort actions . . . the situs of the injury remains a relevant consideration."¹⁴⁴ Why? The loca-

139. *Id.* at 167-68, 583 P.2d at 727-29, 148 Cal. Rptr. at 873-74. Note that comparative pertinence, unlike comparative impairment, can be used to break a true-disinterested conflict. The archaism of a law can be assessed even though its application would be to the detriment of a domiciliary of the state adhering to that law.

Surprisingly, Louisiana law was held to be more pertinent. 22 Cal. 3d at 168, 583 P.2d at 728, 148 Cal. Rptr. at 874. *Offshore* thus becomes the third reported American decision involving a conflict between the substantive law of the forum and that of another state in which out-of-state law was held to be better. The others are *Reminga v. United States*, 448 F. Supp. 445 (W.D. Mich. 1978), *aff'd*, 631 F.2d 449 (6th Cir. 1980) (applying Wisconsin's version of better law choice methodology) and *Bigelow v. Halloran*, 313 N.W.2d 10 (Minn. 1981). *Cf. Myers v. Government Employees Ins. Co.*, 302 Minn. 359, 225 N.W.2d 238 (1974), and *Lichter v. Fritsch*, 77 Wis. 2d 178, 252 N.W.2d 360 (1977), in which courts using the better law methodology applied out-of-state law rather than forum law to benefit the plaintiff without expressly calling the out-of-state law 'better.' *Offshore* is the only case in which out-of-state law was better and plaintiff failed to recover.

The 'antique' statute rejected in *Offshore* had been enacted in 1872 as part of the California equivalent of a Field Code, amended in 1939, and cited some half dozen times in reported cases. A great deal of basic California law will be, under the *Offshore* approach, even more 'antique.' The 1872 Civil Code was an attempt to restate the common law. *See Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). The reason so many of its provisions have been unchanged and are seldom cited is that they are unquestioned as the foundation of the law of the state. Their meaning is so settled that there is no reason to appeal their application by a trial court.

Offshore indicates that much of California law is going to fare very badly under comparative pertinence analysis.

140. *See Hay, Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1644, 1660 n.95 (1981); Juenger, *supra* note 1, at 421-22 (*Offshore* "breathes his [Leflar's] spirit"); Kanowitz, *Comparative Impairment and Better Law: Grand Illusions in the Conflict of Laws*, 30 HASTINGS L.J. 255, 294-97 (1978); Kay, *supra* note 126, at 589 n.82.

141. 22 Cal. 3d at 166, 583 P.2d at 727, 148 Cal. Rptr. at 873.

142. I would suppose, for example, that after *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975), California would consider another state's contributory negligence rule archaic and out of the main stream. Nevertheless, the legislature of the other state may have repeatedly defeated comparative negligence bills, and the supreme court of the other state may have recently reaffirmed the defense as part of the common law. That looks like a pretty strong 'commitment.'

143. *See Kay, supra* note 126, at 593 n.103, 603-04 n.141.

144. 22 Cal. 3d at 148, 583 P.2d at 728, 148 Cal. Rptr. at 874 (citing *Reich*, 67 Cal. 2d at

tion of the tort cannot have anything to do with the archaism or 'betterness' of the competing laws. Nor can territorialism have anything to do with the relative commitments of California and Louisiana once it has been determined that they are each interested. (Although it is true that California could have been held to have no interest at all if its law were construed to be confined to events occurring in California geographically,¹⁴⁵ the court undertook comparative pertinence analysis because it assumed that California was interested despite the Louisiana locale of the injury.)

There are two possible explanations of the ultimate retreat to territorialism in *Offshore*. First, the reference to territorialism was a mishmash form of eclecticism. That is, the court was saying, "Not only does the plaintiff lose under interest analysis with a comparative pertinence break, but under a distinct territorial method it would also lose. Thus, there are two separate reasons for our conclusions." That would be a purposeless eclecticism, leaving the court unable to decide the next conflicts case in which territorialism pointed to a different law than did interest analysis.

Second, the court in *Offshore* could have been trying to state what its third choice break device would be if both comparative impairment and comparative pertinence failed to break the conflict.¹⁴⁶ That would be a purposeful use of eclecticism, and since one should assume that an appellate court is acting purposefully rather than creating a dilemma for itself,

555, 432 P.2d at 730, 63 Cal. Rptr. at 34). This portion of the opinion also states: "By entering Louisiana, plaintiff 'exposed [it]self to the risks of the territory,' and should not expect to subject defendant to a financial hazard that Louisiana law had not created." *Id.* at 169, 583 P.2d at 728, 148 Cal. Rptr. at 874 (quoting D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 147 (1965), in which Professor Cavers advances a highly territorial choice of law methodology).

145. See *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961); *People v. One 1953 Ford Victoria*, 48 Cal. 2d 595, 311 P.2d 480 (1957); Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171 [177]; Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963); Kanowitz, *supra* note 140, at 268-73; Kay, *supra* note 126, at 588 n.67.

146. As indicated *supra* note 127, comparative impairment seldom will break a true-true conflict and simply is unavailable in a true-disinterested conflict. There surely will be a number of cases in which the competing laws are equally antique or modern and in which neither is substantially better than the other. (Personally, I think *Offshore* was such a case.) Resort to the third choice break device, territorialism, thus may not be uncommon. One cannot discern from *Offshore* whether this ultimate territorial reference is to *lex loci* or center of gravity; it is to be hoped that the reference is to the latter so that the mere fortuity of injury or the signing of a contract in a state does not give it the power to control the outcome of the litigation when another jurisdiction is much more territorially involved.

Finally, note that in employing the third choice territorial break device, California will have to grapple, as does New York under its current methodology, with the problem arising if the territorial reference is to a nondomiciliary state. See *infra* text accompanying note 174.

this second construction of the territoriality passage of *Offshore* must be adopted.¹⁴⁷

The California Supreme Court must explain what it has done in *Off-*

147. That *Offshore* provides a pecking order of three different devices for breaking true conflicts may be recognized in *In Re Air Crash Disaster*, 644 F.2d 594, 628 (7th Cir.), cert. denied sub nom. *Lin v. American Airlines, Inc.*, 454 U.S. 878 (1981). The court thought it was dealing with a true-true conflict on the issue of whether punitive damages were available. Several errors were made in reaching this conclusion. The court said that the place of injury, a nondomiciliary state, "has an important interest in the application of its law." *Id.* at 622. It declared that the place of misconduct has a "strong . . . interest"; that place, however, happened to be a domiciliary state. *Id.* It declared a fantastic interest on the part of the domiciliary state of defendant: "Missouri would wish to punish MDC, a Missouri-based corporation, for any wrongdoing . . ." *Id.* at 625.

In any event, having found a true-true conflict, the court then went through a comparative impairment analysis and concluded that both domiciliary states had a strong interest. The court found that at least theoretically one of the states could achieve its goal by other means but apparently considered the 'wipe-out effect' on both states not to be substantially different, since it refused to break the conflict on a comparative impairment basis. See also *Duarte v. McKenzie Constr. Co.*, 152 Cal. Rptr. 373, opinion deleted, 89 Cal. App. 3d 133 (1979), in which the court was able to break a true-true conflict under the first choice break device, comparative impairment. The court then quoted the passages from *Offshore* that had relied on territorialist factors to resolve the conflict as an additional basis for its decision, 152 Cal. Rptr. at 379-80, since the result was the same as that attained using comparative impairment as a break device.

On the other hand, at least one court of appeals opinion since *Offshore* has attempted to confect a hybrid methodology not only out of interest analysis and territorialism but also out of § 6 of the Restatement Second. See *Robert McMullan & Son v. United States Fidelity & Guar. Co.*, 103 Cal. App. 3d 198, 162 Cal. Rptr. 729 (1980).

The interest analysis that the court engaged in did not reveal the break device employed. On its face, the conflict was true-disinterested, with California law limiting the recovery of the California plaintiff and Maryland law expanding the liability of the Maryland defendant, which could have been 'locusized' in Florida but was not. The court turned the true-disinterested into a false conflict by declaring an altruistic interest, curiously based on territorialism:

California has many interests in having its law applied in this case. California is the forum state. Since the contract was made between a California resident and a corporation doing business in California, California has an interest in seeing that such contract is enforced according to the law where it was made.

A significant basis of a contract bargain is knowing the measure of the damages on breach of the contract. A foreseeable measure of damages is part of the risk involved, and in the business world, reflected in the contract price. California has an interest in assuring those who elect to contract in California and avail themselves of California laws that these laws will be applied to ensure this foreseeability. Thus California has an interest in seeing that those electing to contract in California receive the benefit of their bargain.

103 Cal. App. 3d at 205, 162 Cal. Rptr. at 724. It is arguable that the above passage construes California's interest to be the application of the law found by strictly territorial analysis. This approach would be wholly inconsistent with Currie-style interest analysis. In any regard, no attorney or trial judge can possibly be sure that he knows what choice of law method the court in *McMullan* is using. The opinion is eclecticism at its very worst.

shore and then specifically overrule and disapprove many previous decisions that are inconsistent.¹⁴⁸ *Hurtado* must be overruled expressly in two respects: First, its statement that true conflicts are broken by use of forum law,¹⁴⁹ and second, its analysis of the facts of the *Ryan* case by an approach inconsistent with interest analysis (because the concept of false conflict is eliminated).¹⁵⁰ *Offshore* also requires clarification of how California locates corporate litigants for interest analysis purposes.

The court should explain that its preferred basis for conflict breaking is comparative impairment. *Bernhard* must be overruled as an improper usage of this device. The court should explain that it recognizes that comparative impairment can resolve few conflicts. The second choice device—comparative pertinence—is basically a form of better law. Its usage is eclectic in borrowing the theory from Leflar and Minnesota, but California considers this mixture of interest analysis and better law a useful form of eclecticism made necessary by its rejection of Currie's own forum preference, the impossibility of interest weighing, and the improbability of comparative impairment breaking all conflicts.

Finally, it must be conceded that the third choice territorial break device involves eclecticism since the theory was borrowed from the first or second Restatement. Again, it is necessity that forces this use of eclecticism—the recognition that comparative pertinence (better law) will also not always be able to break true-true and true-disinterested conflicts. The court should explain that the Restatement Second becomes pertinent if and only if the forum must resort to this third choice break device. Otherwise citation to the choice of law sections of the Restatement Second is forbidden.

148. Little wonder that the subject of Conflicts was dropped not long ago from the California bar exam.

149. Some courts have failed to see that this portion of *Hurtado* cannot be reconciled with the analysis of and the result in *Offshore*. See *In Re Aircrash*, 684 F.2d 1301, 1307 (9th Cir. 1982) (stating that California breaks true conflicts by reference to forum law and citing *Hurtado*).

150. This repudiation could be explained as follows: *Ryan* was analyzed as it was to enable us in a post-*Hurtado* case to adopt comparative impairment as the only break device used in California. That device could not be used to break a zero-interest or true-disinterested conflict, as *Ryan* was on its face. One cannot impair a nonexistent interest. It was necessary, therefore, to find some method to turn a true-disinterested conflict into either a true-true or a false conflict. The method was recognition of altruistic interests. (New York has had the same problem using interest weighing as a break device. See *infra* notes 161-162 and accompanying text).

Now that we have two back-up break devices, comparative pertinence (better law) and territoriality, we can once again analyze interests in straightforward Currie fashion.

B. New York

New York first rejected the lex loci method for center of gravity in *Auten v. Auten*¹⁵¹ in 1954. The court in *Kilberg v. Northeast Airlines*,¹⁵² in 1961, returned to the lex loci approach but with such gross 'cheating' on the process of characterization of issues as substantive or procedural that it signalled an imminent outright rejection of lex loci.¹⁵³ Commentators have found any number of methodologies latent and patent in New York's next significant choice of law case, the renowned *Babcock v. Jackson*.¹⁵⁴ To me *Babcock* is the clearest case of double mishmash. The court employed both the center of gravity and interest analysis methods to reach its result.¹⁵⁵ (Although the conflict was false, the court in *Babcock* hinted that it would try to use interest weighing to break true-true conflicts under the interest analysis component of the mishmash;¹⁵⁶ the court did not hint what it would do if the mish went for the plaintiff and the

151. 308 N.Y. 155, 124 N.E.2d 99 (1954). This method was followed in *Haag v. Barnes*, 9 N.Y.2d 554, 559, 175 N.E.2d 441, 444, 216 N.Y.S.2d 65, 69 (1961).

152. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

153. The court held that the measure of damages was procedural; therefore, forum law applied. There were hints of interest analysis in the opinion because the suggestion was made that the issue was procedural, only with respect to New York domiciliaries. 9 N.Y.2d at 41-42, 172 N.E.2d at 529, 211 N.Y.S.2d at 137. The *Kilberg* holding was later recast in terms of interest analysis in *Davenport v. Webb*, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962). What is surprising about *Kilberg* is that although the court, which was writing after *Auten* had adopted the center of gravity approach, announced the place of injury to be entirely fortuitous, it did not, even though Massachusetts was the place of injury, simply declare that New York was the center of gravity with respect to passengers who bought tickets in New York, who were domiciliaries of New York, and who boarded the Massachusetts-bound flight in New York. As we shall see, some quite recent cases, trying to keep *Kilberg* viable after the dramatic shift in methodology in New York, have said that New York was the center of gravity in *Kilberg*.

154. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

155. Appearing to use center of gravity, the court cited *Auten* and the tentative draft of the Restatement Second (this was 1963, two years before the Restatement itself became ambiguous with the addition of § 6); it repeatedly mentioned "contacts" and mentioned the phrases "center of gravity" and "grouping of contacts" three times. 12 N.Y.2d at 479-82, 191 N.E.2d at 282-83, 240 N.Y.S.2d at 747-49. As if employing interest analysis, the court discussed the reason for the Ontario guest statute and concluded that it was to protect "Ontario defendants and their insurers," 12 N.Y.2d at 482-85, 191 N.E.2d at 284-85, 240 N.Y.S.2d at 750-51. This matter was irrelevant under center of gravity. The court also stated that "the concern of New York is unquestionably the greater," and it is the "jurisdiction which has the strongest interest." *Id.* at 482, 484, 191 N.E.2d at 284, 285, 240 N.Y.S.2d at 750, 752.

Babcock is a remarkable mishmash case with several sentences mishmashing the two methods. See Juenger, *supra* note 1, at 420 (*Babcock* "cheerfully embraced almost all theories professed by academicians"); Sedler, *Rules*, *supra* note 7, at 983. Amazingly, *Babcock* is still cited by lower courts as if it were good law, when it obviously was a transitional case.

156. 12 N.Y.2d at 482, 191 N.E.2d at 283, 240 N.Y.S.2d at 749. See the quotations *supra* note 155 concerning "greater" and "strongest interest."

mash for the defendant—for example, a false conflict with the only interest in state X, but with all territorial factors in state Y.)

New York's high court briefly returned to center of gravity in 1966 in *Macey v. Rozbicki*.¹⁵⁷ In 1969 in *Tooker v. Lopez*,¹⁵⁸ the court expressly repudiated center of gravity as a method and adopted interest analysis instead.¹⁵⁹ Also, *Tooker*, very importantly, established that in New York domiciliary status, not residence, is the connecting factor for assigning law to the parties.

The court of appeals also repeatedly declared that true conflicts would be broken by determining which state had the greater or paramount interest.¹⁶⁰ This left no solution to a true-disinterested conflict since it would present no interests to weigh. The New York court struggled with that problem in *Intercontinental Planning, Ltd. v. Daystrom, Inc.*,¹⁶¹ in which the New York plaintiff could not recover on an oral contract if the New York statute of frauds applied, but New Jersey law would require the New Jersey defendant to perform the oral undertaking. The court creatively manufactured a New York interest in applying the statute of frauds in favor of out-of-staters in order to attract economic development to New York.¹⁶²

157. 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966). Between *Babcock and Macey* was *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965), which contained both center of gravity and interest analysis *language* (although principles of interest analysis were not properly applied—it was either a false conflict in favor of Colorado law with residence as the connecting factor or a false conflict in favor of New York law with domicile as the connecting factor).

158. 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

159. *Id.* at 577, 249 N.E.2d at 399, 301 N.Y.S.2d at 526.

160. See, e.g., *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969); *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968); *In re Estate of Crichton*, 20 N.Y.2d 124, 228 N.E.2d 799, 281 N.Y.S.2d 811 (1967). See also *Johansen v. Confederation Life Ass'n*, 447 F.2d 175 (2d Cir. 1971). I believe that weighing of interests is simply another way to describe the use of better law as a break device, with the court announcing that the state with the better law has the greater interest in applying it. In my view, any other form of interest weighing must be comparative impairment.

161. 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969).

162. 24 N.Y.2d at 385, 248 N.E.2d at 583, 300 N.Y.S.2d at 827. See also the awful (in the sense of filling the reader with awe at the court's attempt to find something other than the obvious true-disinterested conflict with which it was dealing) decision of *Knieriemen v. Bache Halsey Stuart Shields*, 74 A.D.2d 290, 427 N.Y.S.2d 10 (1980). This appellate division panel was one that insisted on ignoring the shift in methodology in *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972), and hence felt that interest weighing was still the break device employed in New York. A Louisiana plaintiff sued a New York defendant for fraud and negligence. Louisiana law was against plaintiff on two issues: it gave defendant a complete contributory negligence defense and barred punitive damages. New York would merely reduce damages under comparative negligence and would uphold a punitive damage award against the New York defendant. It was "evident," see *supra* note

Finally, in *Neumeier v. Kuehner*,¹⁶³ another classic true-disinterested conflict in which the Ontario plaintiff could not recover if the Ontario guest statute applied and New York law would hold the New York defendant liable, the court of appeals could no longer hide from its lack of a device to break all kinds of true conflicts. The result was a shift from interest weighing to a territorial break, although rather inartfully expressed in three cumbersome 'rules'.¹⁶⁴

117, to the appellate division "that, plaintiff being a Louisiana domiciliary, that State has an interest in seeing that he receive only such damages as will fairly compensate him." 74 A.D.2d at 294, 427 N.Y.S.2d at 13. New York was interested "in punishing the New York defendant," but the Louisiana interest was greater because defendant had not acted maliciously. *Id.* On the negligence issue, the court properly saw that New York had no interest in applying its law to benefit a Louisiana plaintiff, but declared that Louisiana did have an interest in compelling the Louisiana plaintiff to conform to the Louisiana standard of care. *Id.* at 295, 427 N.Y.S.2d at 13-14. The outcome was proper because all the territorial connections were with Louisiana and either a *lex loci* or center of gravity break of the true-disinterested conflict would have selected Louisiana law.

163. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

164. *Id.* at 128, 286 N.E.2d at 457-58, 335 N.Y.S.2d at 70. It seems clear that Rule 1, covering the situation when guest and host are domiciled in the same state, was an attempt to define false conflicts. The court, however, failed to observe that the conflict is equally false when plaintiff and defendant are domiciled in different states that have the same law (e.g., both have a similar guest statute or both have no guest statute). This forces false conflicts like *Chila v. Owens*, 348 F. Supp. 1207 (S.D.N.Y. 1972) (both parties domiciled in different states without guest statutes), into Rule 3 with its presumptive territorial choice of law. The court in *Chila* at once saw that that type of case did not belong in Rule 3 and applied its escape clause ("but not if it can be shown that displacing the normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing uncertainty for litigants," 348 F. Supp. at 1209). But see *Saleem v. Tamm*, 67 Misc. 2d 335, 323 N.Y.S.2d 764 (Supr. Ct. 1971), a pre-*Neumeier* case applying the Fuldian rules from his *Tooker* concurring opinion. Defendant was from Ontario, plaintiff from England, and the accident in New York. Without consulting English law, the court applied Rule 3 rather than Rule 1. *Id.* at 337, 323 N.Y.S.2d at 766.

Rule 1 also requires for a false conflict that the automobile be "registered" in the common domicile state. 31 N.Y.2d at 128, 286 N.E.2d at 457-58, 335 N.Y.S.2d at 70. This apparently is an attempt to create a 'locus' for the insurance company (*see supra* note 133). (The place where the policy was issued seems a more appropriate locus, *see Weintraub, Principles, supra* note 13, at 150, because the insured may have moved himself and his car to another state—place of registration at the time of accident—where the insurer did not do business.) Reference to place of registration, however, should have been stricken from Rule 1 as it applied in *Neumeier*, in which the Ontario guest statute was at issue, since the court there determined that the statute was not intended to protect the insurer, but only the driver. The *Neumeier* majority lifted the Rules without change from Judge Fuld's concurring opinion in *Tooker*, 24 N.Y.2d at 584-85, 249 N.E.2d at 403-04, 301 N.Y.S.2d at 532-33 (Fuld, J., concurring). *Tooker* concerned the Michigan guest statute, which the majority viewed as aimed at "preventing fraudulent claims against local insurers" as well as protecting the driver. *Id.* at 575, 249 N.E.2d at 397, 301 N.Y.S.2d at 524. Although the majority in *Tooker*, 24 N.Y.2d at 577 n.1, 249 N.E.2d at 399 n.1, 301 N.Y.S.2d at 525 n.1, stated that the Michigan guest statute was intended to protect the driver, Fuld apparently was formulating his

As the court in *Neumeier* realized, this method would mean that the *lex loci delicti* often would not be "displace[d]."¹⁶⁵ Subsequent dictum in *Cousins v. Instrument Flyers*,¹⁶⁶ indicated that the territorial break will

rules on the statements in *Babcock*, *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965), and other guest statute choice of law decisions which held that an insurance company located for interest analysis purposes in the state with the guest statute was one of the intended beneficiaries of the statute's protection. Accordingly, Fuld's Rule 1 must be written differently depending on whether the guest statute at issue is directed just at drivers or at insurers as well. That is, if the guest statute at issue is Colorado's—a state that intends by such law to protect the insurer—reference in Rule 1 to the place where the car is registered (the locus of the insurer) is appropriate, but such reference is improper if the statute is Ontario's, since only the driver-owner is the intended beneficiary, and the locus of his insurer is not relevant. This illustrates that, usually, it will be impossible to present a form of interest analysis methodology for choice of law in the shape of 'rules.'

Rule 2 in *Neumeier* defines some true-true conflicts and calls for a territorial break "in the absence of special circumstances." 31 N.Y.2d at 128, 286 N.E.2d at 458, 335 N.Y.S.2d at 70. I have never understood why this escape clause for Rule 2 is so much simpler, verbally, than the mumbo-jumbo escape clause (quoted above) tacked on to Rule 3, which picks up true-disinterested conflicts and false conflicts falling out of Rule 1. Rule 3 also picks up some true-true conflicts because Rule 2 is limited to the case in which the defendant causes the injury "in the state of his domicile" rather than in any state that "does not cast him in liability." *Id.*

165. 31 N.Y.2d at 130, 286 N.E.2d at 458, 335 N.Y.S.2d at 71.

166. 44 N.Y.2d 698, 376 N.E.2d 914, 405 N.Y.S.2d 441 (1978). The court in *Cousins* recognized that the place of injury might be fortuitous, as in *Pan Am. World Airways, Inc. v. Boeing Co.*, 500 F. Supp. 656 (S.D.N.Y. 1980), the suggestion being that some other territorial factor should then govern. That would seem to have to be the center of gravity. Although the court in *Cousins* declared that "*lex loci delicti* remains the general rule," 44 N.Y.2d at 698, 376 N.E.2d at 915, 405 N.Y.S.2d at 442, it appears that New York's method can be described more accurately as interest analysis with a center of gravity break. I believe that the New York court will not apply the *lex loci* unless the place of injury is also the center of gravity. See, e.g., *Rakaric v. Croatia Cultural Club*, 76 A.D.2d 619, 430 N.Y.S.2d 829 (1980). This was a true-true conflict in which charitable immunity was an issue. That the injury occurred in defendant's domicile, New Jersey, was not fortuitous because that was the only location at which the instrumentality causing injury, a chain saw, was to be used. Citing *Neumeier*, the appellate division understood that present New York choice methodology required it to make a territorial break and acknowledged the mention in *Neumeier* of the *lex loci*. But it quoted from Judge Brietel's *Neumeier* opinion the proposition that in some instances "*the situs of the accident is the least of the several [territorial] factors of influence.*" *Id.* at 624, 430 N.Y.S.2d at 833 (emphasis in original). The court in *Rakaric* found plaintiff's domicile to be the center of gravity because he was recruited there to labor for defendant, who transported him from New York to the defendant's real property in New Jersey. One can quibble with this conclusion, but the court did state that what it was doing was allowing the center of gravity to control the choice of law in a true conflict. *Id.* Curiously, however, it explained *Kilberg* not as a center of gravity decision (see *infra* note 168), but as an exception to normally applied choice of law methodology intended to avoid a law considered to be very bad (i.e., like the exception recognized in Wisconsin, see *infra* text accompanying notes 231-245). Compare with *Rakaric*, however, *Hines v. Stalker*, 99 Misc. 2d 610, 416 N.Y.S.2d 986 (Sup. Ct. 1979) (citing both *Neumeier* and *Cousins* for the notion that center of gravity had been discarded in favor of a return to *lex loci* as the

be center of gravity and not *lex loci*. This development overrules *sub silentio* at least one case decided when interest weighing was the declared break device.¹⁶⁷ It requires reinterpreting the reasoning of others such as the well-known *Kilberg* decision.¹⁶⁸

While some lower New York courts and federal courts have understood that *Neumeier* revised the choice of law methodology of New York,¹⁶⁹

primary ingredient of New York choice of law methodology). *Id.* at 619, 416 N.Y.S.2d at 992. See also *Patton v. Carnike*, 510 F. Supp. 625 (N.D.N.Y. 1981) (true-disinterested conflict over dramshop liability broken apparently on center of gravity theory, with *lex loci* rejected). Rosenberg, *supra* note 1, at 445-46, believes that *Neumeier* itself envisions center of gravity as the territorial reference.

167. *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968). Either a *lex loci* break or a center of gravity break would have resulted in applying a prodefendant rule limiting damages. *Miller* is still good law after *Neumeier* only if it involved a false conflict by virtue of assigning the parties the law of the domicile that they had at the time of trial rather than the domicile at the time the cause of action arose.

168. As suggested *supra* note 153, New York certainly could be viewed as the center of gravity on the *Kilberg* facts. That was the explanation of *Kilberg* in *Walkes v. Walkes*, 465 F. Supp. 638 (S.D.N.Y. 1979). This was a true-true conflict regarding damages recoverable for death. Plaintiff and plaintiff's decedent were from Florida, which gave greater damages than New York, defendant's domicile and situs of the injury. The court understood that the general approach of *Neumeier* (that is, the new choice of law method) applied. The court in *Walkes* held that *Kilberg*, which applied the damages law of a state other than the place of injury, was inapplicable because it involved an in transit accident, whereas *Walkes* involved a 'fixed location' accident, the place of accident not being a fortuity. While visiting, decedent fell in defendant's home.

Gordon v. Eastern Air Lines, Inc., 391 F. Supp. 31 (S.D.N.Y. 1975), applied *Kilberg* and New York's unlimited damages law in a true-true conflict both on the theory that New York was the center of gravity and on the theory that its interest, as domiciliary state of plaintiff's decedent, was greater.

Other post-*Neumeier* decisions continue to apply *Kilberg* in situations in which the *lex loci* did not limit damages and New York was not the center of gravity. *E.g.*, *Holzager v. Valley Hosp.*, 482 F. Supp. 629 (S.D.N.Y. 1979) (true-true conflict on damages limitation broken in favor of New York on an interest-weighting theory).

169. See, *e.g.*, *Rogers v. U-Haul Co.*, 41 A.D.2d 834, 342 N.Y.S.2d 158 (1973). Plaintiff's decedent was from Alabama. Defendant was 'locusized' in New York, where it rented the car at issue. (The opinion does not reveal defendant's state of incorporation or principal place of business.) The accident occurred in Pennsylvania, which, unlike New York, did not impose vicarious liability on a rental agency for the tort of its bailee. On the basis of *Neumeier*, the appellate division applied Pennsylvania law, which was correct, of course, only if Alabama also relieved the bailor of vicarious liability. *Id.* at 835, 342 N.Y.S.2d at 160. The court never examined Alabama law to see if there was a false conflict. See Sedler, *Governmental Interest Approach*, *supra* note 12, at 214.

See also *Cunningham v. McNair*, 48 A.D.2d 546, 370 N.Y.S.2d 577 (1975) (another vicarious liability case involving a true conflict broken not by the *lex loci* but on a center of gravity theory, citing *Kilberg*); *Cooperman v. Sunmark Indus. Div. of Sun Oil*, 529 F. Supp. 365 (S.D.N.Y. 1981) (true-disinterested conflict over contributory versus comparative negligence broken by *lex loci* but court stating that *Kilberg* was still good law because of a public policy exception and also implying its disbelief that Rule 2 of *Neumeier* would ever be ap-

others have confined the *Neumeier* method to guest statute cases,¹⁷⁰ and still others have openly stated their disbelief that the New York high court would ever apply Rule 2 of *Neumeier* to deny a New York plaintiff recovery because of an out-of-state guest statute.¹⁷¹

Adding more confusion to the present state of New York conflicts law are the many federal and lower state court cases that seem to treat center of gravity as a separate method of choice of law coexisting in mishmash with interest analysis (using interest weighing or some unspecified break device) rather than treating it as a device for breaking true conflicts. This

plied against a New York plaintiff in a guest statute case, *id.* at 368-69); *Haehl v. Village of Port Chester*, 463 F. Supp. 845 (S.D.N.Y. 1978) (true-true conflict on sovereign immunity broken by *lex loci* but with dictum that this would not be done to saddle New York litigant with unfair out-of-state law).

Hay, *supra* note 140, at 1662-64 n.103, 1668, agrees that a new methodology for New York can be distilled from the rules adopted in *Neumeier*. He cites as a case recognizing the new method *Bing v. Halstead*, 495 F. Supp. 517 (S.D.N.Y. 1980), which Hay feels misapplied the method to be drawn from *Neumeier*. *Id.* See also Ely, *supra* note 12, at 217 (*Neumeier* method is to recognize false conflicts and to decide all others territorially); Sedler, *Rules*, *supra* note 7, at 988-89.

170. *E.g.*, *Chance v. E.I. duPont de Nemours & Co.*, 371 F. Supp. 439 (E.D.N.Y. 1974) (*Neumeier* approach should not carry over to other tort law issues such as strict liability questions—but result consistent with *lex loci* break).

The argument that *Neumeier* is limited to guest statute cases must proceed as follows. First, the *Neumeier* rules were formulated only after the New York high court had dealt with a number of guest statute cases and had been able to conclude that the policies underlying guest statutes had “‘been revealed,’” *Neumeier*, 31 N.Y.2d at 128, 386 N.E.2d at 457, 335 N.Y.S.2d at 69 (quoting *Tooker*, 24 N.Y.2d at 584, 249 N.E.2d at 408, 301 N.Y.S.2d at 532 (Fuld, J., concurring)). Second, the issue before the court, other than a guest statute’s application, is one in which the policies have not been ‘revealed.’ Hence, the predicate for *Neumeier*’s methodology is absent.

This argument is unsound. It has already been shown that the policies concerning the Ontario guest statute had not been fully ‘revealed’ when Fuld wrote his rules for guest statute cases. (See *supra* note 164.) More important, the shift in *Neumeier* from interest weighing to territoriality as a device for breaking true conflicts was not triggered by revelation of the policies underlying guest statutes but by the recognition that interest weighing was impossible in a true-disinterested case like *Neumeier*. See Twerski, *Neumeier v. Kuehner: Where Are the Emperor’s Clothes*, 1 HOFSTRA L. REV. 104 (1973).

171. See *Rosenthal v. Warren*, 475 F.2d 438, 442 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973). “In no way did . . . the Court retreat” from the *Kilberg* notion that New York would not tolerate application of an unfair and anachronistic law against a New York litigant. See also *Haehl v. Village of Port Chester*, 463 F. Supp. 845 (S.D.N.Y. 1978). The courts that cannot believe that *Neumeier* was serious about Rule 2 seize on the following language of *Neumeier*: “It is clear that although New York has a deep interest in protecting its own residents, injured in a foreign state, against unfair and anachronistic statutes of that state, it has no legitimate interest” in applying New York law when the out-of-stater is injured at home, 31 N.Y.2d at 125, 286 N.E.2d at 456, 335 N.Y.S.2d at 68 (emphasis added). Obviously, the emphasized language is inconsistent with the result that Rule 2 demands when a New Yorker is injured in a guest statute state by a driver domiciled in a guest statute state.

mishmash eclecticism is inherent in all New York decisions that still purport to follow *Babcock*¹⁷² and that rely on the Restatement Second in addition to some interest analysis opinions by the New York high court.¹⁷³

To sum up the state of choice of law in New York, the court of appeals with *Neumeier* has settled on a quite precise method of choice of law, but confusion still reigns in the lower courts. The court of appeals should clarify that interest analysis with a territorial break applies to all types of choice of law problems that are suitable to a 'modern' choice of law approach, not just to guest statutes. The court should also make clear that this version of interest analysis applies even if it means that a New York party gets saddled with an 'unfair' law and that center of gravity rather than *lex loci* is the appropriate territorial break. Moreover, the court should emphasize that center of gravity is employed merely as a territorial break and not as a method of choice of law.

Using territorialism as a break device means that when the center of gravity is located in a state without domiciliary connections to the dispute, or without any other basis for application of its law under Currie-style interest analysis, that law will not be applied. Rather, examination of the law under the center of gravity approach will direct the court to one of the domiciliary state's laws. For example, if plaintiff is from state A, defendant from state B, the center of gravity is in state C, and the conflict is true-true, the forum will employ state A law if C's rule favors the plaintiff, state B's law if it favors the defendant.¹⁷⁴

172. *E.g.*, *Machleder v. Dias*, 538 F. Supp. 1364 (S.D.N.Y. 1982); *Natural Resources Corp. v. Royal Resources Corp.*, 427 F. Supp. 880 (S.D.N.Y. 1977); *Martin v. Julius Dierck Equip. Co.*, 52 A.D.2d 463, 384 N.Y.S.2d 479 (1976), *aff'd*, 43 N.Y.2d 583, 374 N.E.2d 97, 403 N.Y.S.2d 185 (1978) (citing both *Babcock* and the Restatement Second); *Estate of Layden*, 92 Misc. 2d 353, 400 N.Y.S.2d 282 (Sup. Ct. 1977) (citing both *Babcock* and the Restatement Second).

173. *E.g.*, *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982); *Rudin v. Dow Jones & Co.*, 510 F. Supp. 210 (S.D.N.Y. 1981); *Jiminez v. Maritime Overseas Corp.*, 360 F. Supp. 142 (S.D.N.Y. 1973); *Bache & Co. v. Int'l Controls Corp.*, 339 F. Supp. 341 (S.D.N.Y. 1972), *aff'd per curiam*, 469 F.2d 696 (2d Cir. 1972) (court applied both center of gravity and interest analysis as distinct methods).

The most astonishing of the federal cases trying to describe New York's choice of law methodology is *In re Air Crash Disaster*, 644 F.2d 594, 628 (7th Cir.), *cert. denied sub nom. Lin v. American Airlines, Inc.*, 454 U.S. 878 (1981), declaring the method to be the Restatement Second's most significant relation test, despite the express rejection of this approach in *Tooker*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519. This simply untenable decision illustrates how desperately guidance from the New York Court of Appeals on the present choice of law methodology is needed.

174. In some cases it will be quite difficult to determine whether state C is sending the forum to A or B. Suppose the issue is damages limitation in wrongful death. State A gives unlimited recovery; state B limits recovery to \$50,000; state C limits it to \$100,000. Does the New York method mean that B law applies if plaintiff claims more than \$150,000 but that A

C. Oregon

An unusual form of eclecticism has infected many Oregon choice of law cases. Some employ a pure interest analysis methodology,¹⁷⁶ some a pure center of gravity,¹⁷⁶ and some a combination of these methods in what seems to be interest analysis with a center of gravity break device rather than a two-method mishmash.

Oregon first broke with the *lex loci* in the oft-cited case of *Lilienthal v. Kaufman*,¹⁷⁷ a contract case in which the methodology employed was pure interest analysis. The conflict was properly identified as true-true, and the break device employed was use of forum law since Oregon was one of the states involved. The court in *Lilienthal* cited the Restatement Second, then in tentative draft form, solely as an example of a method that would have reached a different result and that was not being followed.

The next choice of law decision in Oregon was a tort case, *Casey v. Manson Construction & Engineering Co.*¹⁷⁸ In the course of the opinion the Oregon Supreme Court declared that it was "adopt[ing]" as the choice of law method for Oregon the "most significant relation" approach of the Restatement Second.¹⁷⁹ Without, however, any citation to proposed section 6 of the then pending Official Draft of the Restatement Second, a large portion of the opinion is devoted to an interest analysis

law applies if the claim is between \$50,000 and \$150,000? That seems almost ridiculous. The *C* rule should be viewed as prodefendant and should direct the forum to the *B* law in all cases.

Certainly the state *C* law itself should not be applied if both state *A* and *B* are interested, since interest analysis remains the foundation of the New York methodology. If the conflict is true-disinterested, however, with the plaintiff hailing from the state that limits damages to \$50,000 and defendant from the state awarding unlimited damages, it would seem that state *C* has as much basis under interest analysis theory for application of its law as do *A* and *B*. Perhaps in this situation New York will use the *lex loci* or center of gravity as the basis for selection of law rather than as merely a break device.

On the problem of state *C*'s law differing from that of *A* and *B*, see Weintraub, *Principles*, *supra* note 13, at 152.

175. *Lilienthal v. Kaufman*, 239 Or. 1, 395 P.2d 543 (1964) (true-true conflict on validity of contract issue broken Currie-style by applying forum law).

176. *Davis v. State Farm Mut. Auto. Ins. Co.*, 264 Or. 547, 507 P.2d 9 (1973) (contract case in which the Restatement Second was applied mechanically with no suggestion of interest analysis, although the latter method would have reached same result); *Western Energy, Inc. v. Georgia-Pacific Corp.*, 55 Or. App. 138, 637 P.2d 223 (1981) (tort case in which court mechanically applied Restatement Second to choose out-of-state law and deny recovery when interest analysis would have reached different result because both parties were viewed as located in Oregon, a recovery state).

177. 239 Or. 1, 395 P.2d 543 (1964).

178. 247 Or. 274, 428 P.2d 898 (1967).

179. *Id.* at 287-88, 428 P.2d at 904-05.

approach in which the court identified the conflict as true-true. Although such early mishmash decisions as *Babcock v. Jackson*¹⁸⁰ are cited in the course of the interest analysis portion of the opinion, *Casey* itself does not seem to be a mishmash decision. Unlike *Babcock*, in which the conflict was false and the court could declare that it reached the same result under both interest analysis and center of gravity, in *Casey* the conflict was true and to resolve it under interest analysis some break device was needed. I read *Casey* as using center of gravity as the break device that led to application of the out-of-state law of Washington.

Six years later the Oregon Supreme Court decided *Erwin v. Thomas*.¹⁸¹ Plaintiff was a domiciliary of the state of Washington, whose law gave her no tort recovery. Defendant was a domiciliary of Oregon, whose law cast him in liability. Applying interest analysis methodology, the court ascertained that Washington had no interest. That is, it was a true-disinterested conflict.¹⁸² The break device was to apply forum law. The court acknowledged that *Casey* purported to have adopted the significant relation choice of law method of the Restatement Second, but it said that *Casey* was distinguishable since Washington had had an interest there (that is, *Casey* was a true-true conflict).¹⁸³ When the foreign jurisdiction had no interest, there was no need to determine what state had the most significant relation to the issues. This reading of *Casey* supports my theory that center of gravity was used there not in mishmash as an alternative basis for decision but as the device for breaking a true conflict.

Most recently, the Oregon Supreme Court decided *Tower v. Schwabe*,¹⁸⁴ in which the court first announced that the methodology for choice of law employed in Oregon was the Restatement Second's significant relation approach. Immediately the analysis shifted into pure interest analysis with no discussion of the territorial theory of the Restatement Second and not even a citation to its pertinent sections. *Tower* was a classic false conflict; both plaintiff and defendant were Oregon domiciliaries and British Columbia was the place of the tort. Because British Columbia had no interest in applying its law to grant a recovery to an Oregonian (the archetypal chauvinistic lawmaker of pure Currie interest analysis), it was "unnecessary to proceed further" with any choice of law analysis.¹⁸⁵

Without doubt, the status of choice of law is uncertain in Oregon.¹⁸⁶

180. See *supra* text accompanying notes 154-156.

181. 264 Or. 454, 506 P.2d 494 (1973).

182. *Id.* at 459, 506 P.2d at 496.

183. *Id.* at 461, 506 P.2d at 497.

184. 284 Or. 105, 585 P.2d 662 (1978).

185. *Id.* at 108, 585 P.2d at 663.

186. See Nafziger & Dixon, *Oregon's Choice-of-Law Process*, 60 OR. L. REV. 219 (1981).

The dominant methodology is interest analysis. Thus, the reasoning of at least two decisions employing solely a center of gravity approach with no interest analysis should be disapproved.¹⁸⁷ In false conflict cases, interest analysis alone supplies a governing law, and the law of a state only territorially involved will not be considered even if it is the only law under which the plaintiff or 'good guy' will prevail.¹⁸⁸ The *Erwin* case indicates that true-disinterested conflicts will be broken by reference to forum law.¹⁸⁹ *Lilienthal*, which broke a true-true conflict by turning to forum law, is inconsistent with the subsequent decision in *Casey*, in which the court employed center of gravity to break a true-true conflict. One of these decisions must be overruled. If, under *Erwin*, forum law is still to be used to break true-disinterested conflicts, *Casey* is the case to be rejected. It is senseless to use a forum break for true-disinterested conflicts and a territorial break for true-trues. This approach to clarifying Oregon law would reject center of gravity in all cases suitable for a modern approach to choice of law method. The Oregon Supreme Court must then stop confusing bench and bar by stating that it follows the Restatement Second's method.

If *Lilienthal* is to be overruled, *Erwin* should go down with it and *Casey* should lead to use of center of gravity to break both true-true and true-disinterested conflicts. Still, the Oregon Supreme Court should refrain from saying that it uses the methodology of the Restatement Second. This Article has shown that some courts have construed the combination of section 6 of the Restatement Second with the various territorial directives of subsequent sections to equal interest analysis with a center

The authors state that Oregon's approach is an "eclectic or hybrid" employing both interest analysis and significant relationship elements, resulting in "considerable uncertainty." *Id.* at 221-22, 223. These writers for the most part are highly critical of the use of forum law as a break device under interest analysis and the total rejection of any better law methodology in cases like *Tower*, in which the plaintiff or 'good guy' can prevail only under the law of a state involved territorially. *Id.* at 223, 234-38. It seems to me that interjection of better law would just increase the confusion by introducing a third and distinct methodology into Oregon choice of law jurisprudence.

187. *Davis v. State Farm Mut. Auto. Ins. Co.*, 264 Or. 547, 507 P.2d 9 (1973). See *supra* note 159; *Western Energy, Inc. v. Georgia-Pacific Corp.*, 55 Or. App. 138, 637 P.2d 223 (1981) (pure center of gravity in false representation tort case). *Davis* seems to imply that interest analysis is not suitable in contract cases, yet *Lilienthal* is one of the most famous interest analysis decisions from any American jurisdiction and, of course, can be viewed only as a contract case. If interest analysis is appropriate in tort cases, no reason appears that it is not suitable for *most* contract issues, although obviously not for all. See Brainerd Currie's memorable concession that "a contract to dance naked in the streets of Rome can hardly be considered without reference to Roman Law." Currie, *Married Women's Contracts*, *supra* note 15, at 248 [84].

188. *Tower*, 284 Or. 105, 585 P.2d 662.

189. 264 Or. at 459-60, 506 P.2d at 496.

of gravity break device.¹⁹⁰ But the Restatement Second nowhere specifically says that. Oregonians would be more fairly apprised of the methodology resulting from the overruling of *Lilienthal* and *Erwin* if it were described as interest analysis with use of territorialism to break true conflicts.

D. Pennsylvania

Eclecticism is thriving in the Keystone state's choice of law methodology, and it remains uncertain in what form: either as a two-method mishmash comprised of interest analysis (break device uncertain) and Restatement Second style center of gravity, or, as in New York, as interest analysis with a purposeful use of center of gravity to break true conflicts.

Pennsylvania broke with the *lex loci* in 1964 with *Griffith v. United Air Lines, Inc.*¹⁹¹ As the United States Court of Appeals for the Third Circuit later observed, the court in *Griffith* applied *seriatim* a Currie-style interest analysis as a method as well as center of gravity as a method, citing the then-tentative drafts of the Restatement Second.¹⁹² Since both methods reached the same result in *Griffith*, the Pennsylvania Supreme Court was not forced to choose between the two or otherwise explain what it would do if they reached inconsistent results, as will happen when the center of gravity lies elsewhere than the common domicile of the litigants.

The next modern conflicts case was also a false conflict and was decided solely on interest analysis theory.¹⁹³ Then, the Pennsylvania Supreme Court faced a true-true conflict, *Cipolla v. Shaposka*,¹⁹⁴ and employed a territorial break device to resolve it.¹⁹⁵ The intermediate appellate court in a contract case then cited both *Griffith* and *Cipolla*,

190. See *supra* text accompanying notes 102-103.

191. 416 Pa. 1, 203 A.2d 796 (1964). To followers of interest analysis, this was a false conflict if the corporate defendant was 'locusized' into Pennsylvania, the state from which it entered into its relationship with the deceased Pennsylvania domiciliary, whose heirs were suing for wrongful death. The conflict cannot be classified at all if the defendant were located in its state of incorporation, Delaware, or principal place of business, Illinois, since the substantive laws of those states were not discussed.

192. *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1309 (3d Cir. 1978).

193. *McSwain v. McSwain*, 420 Pa. 86, 215 A.2d 677 (1966). The issue was spousal immunity and the law of the common domicile (denying recovery) was applied. The Restatement Second was not cited. Section 169 of the Restatement Second says that it also usually chooses the law of the common domicile, but § 169 requires an analysis of the territorial contacts listed in § 145, including place of injury and place of misconduct.

194. 439 Pa. 563, 267 A.2d 854 (1970).

195. The court said it was using a "highly territorial approach," *id.* at 567, 267 A.2d at 857, and did not state specifically whether it was resorting to *lex loci* or center of gravity. In a portion of the opinion in which a distinctly different approach was taken, the court seemed to say it could also break the true-true conflict by a weighing of interests (almost a counting of interests). *Id.* at 566, 267 A.2d at 856.

followed by the observation that the state's choice of law methodology was found in section 6 of the Restatement Second.¹⁹⁶ That court went on to use section 188.¹⁹⁷ Most recently the Pennsylvania Supreme Court relied strongly on the Restatement Second in a case involving the validity of a devise of out-of-state land by a Pennsylvania domiciliary.¹⁹⁸ Meanwhile, another intermediate appellate court has viewed *Griffith* as adopting a "flexible contacts methodology."¹⁹⁹

The federal courts, forced by *Klaxon Co. v. Stentor Electric Manufacturing Co.*²⁰⁰ to try to comprehend Pennsylvania choice of law methodology, have stated varying views on what *Griffith* means. One Third Circuit panel said that in *Griffith* the court adopted neither of the two methods discussed in the opinion, but tried to create a new one incorporating the "essence" of both.²⁰¹ Although that panel did not specifically describe it as such, the only nonmishmash combination method I can see in *Griffith* is interest analysis with a center of gravity break device. A different Third Circuit panel viewed *Griffith* as adopting a double-method mishmash. That is, the forum is to apply, separately, interest analysis (break device unspecified—apparently interest weighing) and center of gravity.²⁰²

Eclecticism is indeed present in Pennsylvania. Two things do seem certain about Pennsylvania choice of law methodology: First, false conflicts will be recognized as such, Currie-style, without regard to the center of gravity, and second, territorialism is extremely important in the Pennsylvania choice of law process.²⁰³ Since, as has been shown,²⁰⁴ a double-method mishmash is both senseless and often inept in resolving a conflict of laws, it is to be hoped that the Pennsylvania Supreme Court will resolve uncertainties by describing its one method as interest analysis with a territorial break,²⁰⁵ the same as apparently employed in New York.

196. *Gillan v. Gillan*, 236 Pa. Super. 147, 150-51, 345 A.2d 742, 744 (1975).

197. *Id.* at 151, 345 A.2d at 745.

198. *Estate of Janney*, 497 Pa. —, 446 A.2d 1265 (1982).

199. *Nationwide Mut. Ins. Co. v. Walter*, 290 Pa. Super. 129, 434 A.2d 164, 168 (1981).

200. 313 U.S. 487 (1941). *See also* *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975).

201. *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 170 (3d Cir. 1980), *rev'd on other grounds*, 102 S. Ct. 252 (1981). Actually, in *Reyno* the Third Circuit considered *Griffith* a fusion of three methods: Currie-style interest analysis, Ehrenzweig-style interest analysis, and Restatement Second center of gravity.

202. *Melville v. American Home Assurance Co.*, 584 F.2d 1306 (3d Cir. 1978). *See also* *United States v. Philadelphia Health Management Corp.*, 519 F. Supp. 818, 825 n.8 (E.D. Pa. 1981) ("the flexible contacts/interest analysis adopted in Pennsylvania in *Griffith*").

203. *See* the discussion of the significance of territorialism based on the *Cipolla* opinion in *Broome v. Antlers Hunting Club*, 595 F.2d 921, 924-25 (3d Cir. 1979).

204. *See supra* text accompanying notes 38-39.

205. The court in *Griffith* did say that it was adopting "a new approach," not two new

E. Minnesota

Minnesota abandoned the *lex loci* in 1966,²⁰⁶ and apparently adopted a method similar to center of gravity.²⁰⁷ Not long after the New Hampshire Supreme Court purported to have fashioned a new choice of law method out of Leflar's five choice-influencing considerations²⁰⁸ in the case of

approaches. 416 Pa. at 23, 203 A.2d at 806.

206. *Kopp v. Rechtzigel*, 273 Minn. 441, 141 N.W.2d 526 (1966); *Balts v. Balts*, 273 Minn. 419, 142 N.W.2d 66 (1966).

207. Both *Kopp* and *Balts* were false conflict cases under interest analysis theory. Although the court cited *Babcock*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743, and *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965), in which the germ of interest analysis can be found, the language of *Kopp* and *Balts* is territorial and shares little with interest analysis.

208. See Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 282-304 (1966); Leflar, *More, supra* note 65, at 1586-88 (1966).

I believe that Leflar did not originally intend the five choice-influencing considerations (see *supra* note 65) to constitute a choice of law method. See Leflar, *The "New" Choice of Law*, 21 AM. U.L. REV. 457, 459 (1972) ("The present writer's 'choice-influencing considerations' approach is an effort to identify the actual reasons which motivate courts to choose one law or another in conflicts cases, and to bring the choice-of-law process into line with these real reasons."); Leflar, *The Torts Provisions, supra* note 21, at 271-72 (better law is "one of the factors that motivate the courts.").

That is, a court that strictly applied the *lex loci*, even though it caused a forum domiciliary to lose the case because of bad law, was motivated by consideration number one, "predictability of results." See *infra* text accompanying notes 213-214. Other decisions manipulated or cheated on the *lex loci*. See *University of Chicago v. Dater*, 277 Mich. 658, 270 N.W. 175 (1936) (Michigan court applied its own law, holding that a married woman, who was a Michigan resident, could not bind her separate estate through a contract to be performed in Illinois, a state that recognized married women's contracts) and *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E.2d 597 (1936) (court held that New York wife could not sue husband for damages incurred in Connecticut, although Connecticut allowed such actions). The courts in *Dater* and *Mertz* were motivated by choice-influencing consideration number four, advancement of the forum's governmental interest, see *infra* text accompanying notes 213-214. A decision that 'cheats' on the interest analysis method by creating a hypothetical interest to the benefit of a nondomiciliary is *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969) (court applied New York statute of frauds to strike down a brokerage contract between a New York corporation, plaintiff, and a New Jersey corporation, holding that New York legislature intended to protect not only New York corporations, but other companies that did business in New York, such as defendant in *Daystrom*). The court in *Daystrom* was motivated by the better law consideration, number five, see *infra* text accompanying notes 213-214. In addition, there is a decision by a forum that employs the 'better law method' ordinarily, but which nevertheless recognized a limitation on damages when the only connection to the 'better law' state is plaintiff's domicile. *Maguire v. Exeter & Hampton Elec. Co.*, 114 N.H. 589, 325 A.2d 778 (1974) (court applied New Hampshire law in wrongful death action, even though its law limited damages, because the only contact with Maine, the 'better law' state, which did not limit damages, was that the decedent had been domiciled there). The court in *Maguire* was motivated by a concern for "maintenance of interstate and international order," *infra* text accompanying notes 213-214, in refusing to sanction an approach that would apply the law of a state with slight

Clark v. Clark,²⁰⁹ the Minnesota court referred favorably to this method in a 1968 case,²¹⁰ only to return to a pure center of gravity approach in 1972.²¹¹ At last in 1973 the Minnesota Supreme Court in *Milkovich v. Saari*²¹² firmly settled on the choice-influencing considerations method and has adhered to it ever since.

An analysis of *Milkovich* and subsequent choice of law cases shows, however, that there are not five choice-influencing considerations, but only two. Lip service is given in most opinions²¹³ to all five, which are:

- (1) predictability of results,
- (2) maintenance of interstate and international order,
- (3) simplification of the judicial task,
- (4) advancement of the forum's governmental interests, and
- (5) application of the better rule of law.²¹⁴

The first three considerations have never affected the outcome of any Minnesota case, and it is hard to imagine a case in which one of them might.²¹⁵ Number (3) surely never will. Nothing is simpler than applying Minnesota law in a Minnesota court, and since factors (4) and (5) usually point to application of Minnesota law, factor (3) is unnecessary. If out-of-state law were found to be better,²¹⁶ the court must know what the out-

connection to the dispute.

209. 107 N.H. 351, 222 A.2d 205 (1966).

210. *Schneider v. Nichols*, 280 Minn. 139, 158 N.W.2d 254 (1968).

211. *Allen v. Gannaway*, 294 Minn. 1, 199 N.W.2d 424 (1972); *Bolgrean v. Stich*, 293 Minn. 8, 196 N.W.2d 442 (1972).

212. 295 Minn. 155, 203 N.W.2d 408 (1973).

213. But see *Schwartz v. Consolidated Freightways Corp.*, 300 Minn. 487, 221 N.W.2d 665 (1974), *cert. denied*, 425 U.S. 959 (1976), and *Bigelow v. Halloran*, 313 N.W.2d 10 (Minn. 1981), not even mentioning the first three alleged considerations and stating that only numbers 4 and 5 are pertinent in tort cases.

214. *Milkovich*, 295 Minn. 155, 203 N.W.2d 408; Leflar, *More, supra* note 65, at 1585-88.

Cases in addition to *Milkovich* that needlessly trot out all five of the alleged influencing considerations are, in chronological order, *Schneider v. Nichols*, 280 Minn. 139, 158 N.W.2d 254 (1968); *Myers v. Government Employees Ins. Co.*, 302 Minn. 359, 225 N.W.2d 238 (1974) (in which, curiously, although the action was a third party beneficiary contract suit, the court declared that factors numbers 1, 2, and 3 "present few problems in tort cases." 302 Minn. at 365, 225 N.W.2d at 242); *Blamey v. Brown*, 270 N.W.2d 884 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980); *Hime v. State Farm Fire & Cas. Co.*, 284 N.W.2d 829 (Minn. 1979), *cert. denied*, 444 U.S. 1032 (1980); *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43 (Minn. 1979), *aff'd*, 449 U.S. 302 (1981); *Estate of Congdon*, 309 N.W.2d 261 (Minn. 1981). The last case, *Congdon*, involving an issue of validity of a will, established that Minnesota will not confine its choice-influencing considerations (e.g., better law) methodology to personal injury cases.

215. See Kanowitz, *supra* note 140, at 286.

216. That has happened once in Minnesota. See *Bigelow v. Halloran*, 313 N.W.2d 10 (Minn. 1981).

of-state law is and hence should have no difficulty applying it.²¹⁷

Nor is consideration number (2) ever likely to affect the outcome of Minnesota choice of law cases. The Minnesota Supreme Court has said that in almost every case in which the bare minimum contacts constitutionally necessary for application of a body of substantive law exist, application of that law will not so insult another sovereign that there will be a breakdown in interstate or international order.²¹⁸ If consideration number (2) simply tells a Minnesota court not to apply a law if it is unconstitutional to do so, it is meaningless in the choice of law process.

The Minnesota Supreme Court, however, also has suggested that consideration number (2) comes into play when the plaintiff seeking application of Minnesota law,²¹⁹ which is constitutionally eligible, has engaged in deliberate law-shopping. That is, he was not a Minnesota domiciliary at the time the cause of action arose.²²⁰ That might provide one vote for the law favoring defendant, but considerations number (4) and (5) will, as we shall see,²²¹ militate in favor of applying the proplaintiff Minnesota law,

217. *Cf. Hague v. Allstate Ins. Co.*, 289 N.W.2d 43 (Minn. 1979), *aff'd*, 449 U.S. 302 (1981), in which there was doubt about what the contending out-of-state law in fact provided. Because the out-of-state law was statutory, said the court, there should be little trouble resolving construction problems, and hence the parties were correct in conceding that consideration number (3) was not pertinent.

In a case like *Walton v. Arabian Am. Oil Co.*, 233 F.2d 541 (2d Cir. 1956), in which the out-of-state law in contention is foreign and not judicially noticeable for lack of legal texts authoritatively describing it, selection of another eligible law would not result so much from application of consideration number (3) as from the fact that the court did not know what the law was and could not apply it as being 'better.'

The strongest case for having factor (3) influence the choice of law outcome is this: the court understands the out-of-state law and realizes that it is better because under it, plaintiff will win and recover damages. Plaintiff, however, is an out-of-state domiciliary, which weakens the case for a prorecovery judgment in a Minnesota court, and, moreover, the out-of-state law is incredibly complex and will require interminable hearings, utilization of costly expert witnesses, and so forth. I predict, however, that out-of-state law will be applied despite the inconvenience. In *Bigelow v. Halloran*, 313 N.W.2d 10 (Minn. 1981), for example, an out-of-state plaintiff sought damages under an out-of-state law that was 'better.' Minnesota law would have resulted in an immediate dismissal, certainly "simplify[ing] . . . the judicial task." See *supra* text accompanying note 188. But the out-of-state law was held applicable.

218. *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 49 (Minn. 1979), *aff'd*, 449 U.S. 302 (1981).

219. I would assume that interstate and international order would not be threatened if the Minnesota court rejected application of Minnesota law and that consideration number (2) is directed only to the possible insult or affront caused by Minnesota to some other sovereign when Minnesota refuses to apply that jurisdiction's substantive law.

220. *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 49 (Minn. 1979), *aff'd*, 449 U.S. 302 (1981).

221. See *infra* text accompanying notes 225-228.

which would prevail by a 2-1 margin.²²² For a similar reason, consideration number (1), predictability of result, will never affect the outcome of a Minnesota choice of law case. Even if considered a pertinent factor, it apparently will always lose out on a 2-1 vote to the better law and consideration number (4) and (5).²²³

Moreover, a pure 'better law' system, which Minnesota on analysis appears to employ, does assure predictability of result. A potential defendant in a suit in tort or contract knows that if litigation does ensue and a choice of law problem does arise, the most unfavorable substantive rules will be chosen. He knows that the court will recognize the broadest tort duty and the most expansive contractual undertaking.²²⁴ The only reason there may be predictability problems is no fault of Minnesota's: it is that not all jurisdictions employ the pure better law method. Since there is no one American method that attracts anything approaching majority support among the jurisdictions, there is nothing Minnesota can do to foster predictability of result. It may as well stick with pure better law unless and until it finds that it is standing alone or almost alone in resisting adoption of some other method.

That considerations (4) and (5), interest of the forum and better law,

222. Even if the defendant could find support under consideration number (1), at best there would be a 2-2 tie. The court probably would hold that in cases of ties there is no reason for not applying forum law. On the other hand, the court might hold that factors (4) and (5) are entitled to more weight, which is certainly the tenor of *Milkovich* and its progeny.

223. That is what has happened to date in all cases in which the Minnesota Supreme Court did weigh predictability of result rather than dismissing that consideration as irrelevant. See *Blamey v. Brown*, 270 N.W.2d 884 (Minn. 1978), in which the court conceded that a bartender selling alcoholic beverages in Wisconsin might predict that Wisconsin law would apply to the consequences of that Wisconsin sale, which caused a minor to become inebriated and cause an accident. Nevertheless, considerations (4) and (5) pointed to application of the better law of Minnesota, which imposed liability.

224. At least that is so when the defendant promisor is Minnesota's favorite whipping boy in choice of law, an insurance company. See *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43 (Minn. 1979), *aff'd*, 449 U.S. 302 (1981) (implying into contract a 'stacking' provision that trebled liability); *Hime v. State Farm Fire & Cas. Co.*, 284 N.W.2d 829 (Minn. 1979) (invalidating a clause of the contract by which promisor sought to restrict liability). Cf. *Martin*, *supra* note 117, at 148 n.68 ("[t]raditionally insurance companies get the short end of the stick" in choice of law cases). The court does recognize that these are contract, not tort, cases, for the plaintiff in *Hague* was referred to as a "third party beneficiary." *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 49 (Minn. 1979), *aff'd*, 449 U.S. 302 (1981). But see *Myers v. Government Employees Ins. Co.*, 302 Minn. 359, 225 N.W.2d 238 (1974), in which a third party beneficiary's direct action suit in contract was described by the court as a tort case. Whether the 'better law' is that which imposes the broadest contractual undertaking is an issue undecided in Minnesota when the promisor is, for example, a small business person, a charitable corporation, etc. Cf. *Alsides, Inc. v. Larson*, 300 Minn. 285, 293, 220 N.W.2d 274, 278 (1974) (dictum) (better law would be applied to the benefit of large Ohio business enterprise at expense of Minnesota 'little guy').

mean the same thing was established in the *Milkovich* case, which adopted choice-influencing considerations as the choice of law method for Minnesota. In the argot of interest analysis, *Milkovich* was a false conflict. All the domiciliary contacts were with Ontario; Minnesota, the scene of the automobile accident, was only territorially involved. In discussing consideration (4), the court announced that Minnesota's governmental interest in a choice of law case was in doing justice.²²⁵ Of course, that meant applying the better law, or in other words, the law that favored the plaintiff.

Two post-*Milkovich* cases²²⁶ suggested that consideration number (4) could mean something different if the Minnesota law in contention in a conflicts dispute favored a Minnesota party. It appeared that in such circumstances Minnesota law might apply by virtue of consideration number (4) even if it were not better, that is, even if it favored an alleged tortfeasor or contract promisor. But these cases are inconsistent with the most recent choice of law decision from the Minnesota Supreme Court, *Bigelow v. Halloran*,²²⁷ which seems to leave no doubt that Minnesota's governmental interest, consideration number (4), is always to apply the 'just' law, that is, the better law found under consideration number (5), even if a Minnesota domiciliary must suffer. In *Bigelow*, plaintiff was from Iowa and defendant's decedent was a Minnesota domiciliary. Minnesota law protected the decedent's estate by abating the cause of action against him upon his death; Iowa provided for survival of the cause of action. The court announced that Minnesota had no governmental interest in permitting the Minnesota estate to avoid its liability to plaintiff

225. *Milkovich*, 295 Minn. at 165, 203 N.W.2d at 417.

226. In *Myers v. Government Employees Ins. Co.*, 302 Minn. 359, 225 N.W.2d 238 (1974), a Minnesota "resident" plaintiff and tort victim was attempting to sue the tortfeasor's insurance company under the Louisiana direct action statute. Minnesota law would have upheld, but Louisiana law invalidated, the provision of the insurance policy denying all third party beneficiary rights against the insurer by a tort victim until that victim obtained judgment against the tortfeasor. The Minnesota Supreme Court, in analyzing consideration number (4), declared that it had an interest in seeing 'its citizen' have access to the courts, which the direct action statute provided. The decision to apply Louisiana law was squarely based on consideration number (4); the court found it unnecessary to declare Louisiana contract law better than Minnesota's.

In *Schwartz v. Consolidated Freightways Corp.*, 300 Minn. 487, 221 N.W.2d 665 (1974), *cert. denied*, 425 U.S. 959 (1976), the issue was whether to give a Minnesota domiciliary suing in tort a partial recovery under Minnesota's comparative negligence doctrine or no recovery under Indiana's contributory negligence rule. The decision to apply Minnesota's law rested on consideration number (4) and on Minnesota's interest in seeing that the Minnesota domiciliary recover compensation. The court declined to get into the issue of whether comparative negligence was better law compared to contributory negligence.

227. 313 N.W.2d 10 (Minn. 1981).

under the 'better' Iowa law.²²⁸

After *Bigelow*, then, the better law always gets two votes, one under consideration number (4), the forum's interest in justice for all, and one under number (5). Minnesota's choice of law method is quite straightforward: the court examines on each issue all of the laws that constitutionally can apply and selects the one that is most favorable to the party who has claimed injury or breach of promise by the other.

There is presently no eclecticism at all in Minnesota choice of law methodology, which promotes predictability of result more than any other methodology in use in the United States. The Minnesota Supreme Court could make the method simpler to apply if it would announce to the bench and bar what is clear from an analysis of the opinions: there is only one choice-influencing consideration, not five.²²⁹ Finally, it might be useful for the Minnesota court to indicate that there are areas of law in which the modern approach is irrelevant and old-fashioned territorialism by necessity must still apply.²³⁰

F. Wisconsin

Wisconsin first rejected the *lex loci* in a 1965 *Babcock*-type opinion, which contained elements of both interest analysis—although the break device was not clearly specified since the conflict was false—and center of gravity.²³¹ Two years later the Wisconsin Supreme Court declared that its choice of law method was Leflar's choice-influencing considerations.²³² Although it appears obligatory in most Wisconsin cases to recite all five considerations, at least one opinion conceded that the fifth, better law, is the only truly significant consideration of the five.²³³ As with Minnesota,

228. *Id.* at 12.

229. Leflar himself has said: "The courts, once they have identified a desirable result supported by good reasons, might as well phrase their opinion in terms of those good reasons, and forgo the theorizing." Leflar, *Conflicts Law*, *supra* note 1, at 1095.

230. Consider a case in which a Minnesota decedent's will creates in favor of a Minnesota devisee a future interest in land that is void under the rule against perpetuities of the situs state, which employs the historic 'remorseless' application approach to the rule. Assume further that Minnesota will adopt the modern ('better') wait-and-see version of the rule. See RESTATEMENT (SECOND) PROPERTY § 1.4 (Tent. Draft 1978), under which the interest will almost certainly be valid. Using Leflar's choice-influencing considerations, the latter law would get two votes (considerations (4) and (5)). Thus, even if situs law got one vote under consideration number (2), maintenance of interstate order, it would lose out. If Minnesota is to apply situs law, as I believe it would, it will have to declare the issue unsuitable for resolution under the modern approach to choice of law employed in Minnesota.

231. *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

232. *Heath v. Zellmer*, 35 Wis. 2d 578, 151 N.W.2d 664 (1967).

233. *Haines v. Mid-Century Ins. Co.*, 47 Wis. 2d 442, 177 N.W.2d 328 (1970) (applying the Leflar method in mishmash with center of gravity in a contract case).

it seems improbable that any case will ever arise in which the Leflarian method points to a law that is not the better law.²³⁴ Hence, it seems appropriate to define the method that Wisconsin cases have distilled from Leflar simply as better law.

Until 1973 Wisconsin, like Minnesota, seemed to use the better law theory as a distinct method. Although talk of state interest was mixed into its choice of law opinions, this arose only from the felt need to acknowledge the existence of consideration number (4) rather than from the court's acceptance of interest analysis as a method of choice of law. In *Conklin v. Horner*,²³⁵ the court thus chose the 'better' prerescovery law of the place of injury even though both plaintiff and defendant were from a guest statute state, which would make the conflict false under interest analysis.

With *Hunker v. Royal Indemnity Co.*²³⁶ in 1973, however, the court shifted to a method best described as interest analysis with a better law break device coupled with a 'pure' better law exception for false conflicts in which the law of the domiciliary state or states is a "drag on the coat-tails of civilization"²³⁷ or a "vestige of 'a creed outworn.'"²³⁸ That is, if the law chosen under interest analysis is considered terrible, and a much better rule can be obtained by reverting to a pure better law method Minnesota-style, the Wisconsin Supreme Court will do so.²³⁹

234. *But cf.* *Lichter v. Fritsch*, 77 Wis. 2d 178, 252 N.W.2d 360 (1977). The conflict was between an out-of-state law under which plaintiff prevailed in tort and a Wisconsin law that absolved defendant of liability. Surprisingly unwilling to declare the out-of-state law better, which it obviously was to a believer in Leflar's method, the Wisconsin Supreme Court relied on considerations number (1) and (2) to reach the result that the 'better law' approach compelled. 77 Wis. 2d at 186-87, 252 N.W.2d at 361.

235. 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

236. 57 Wis. 2d 588, 204 N.W.2d 897 (1973).

237. *Hunker*, 57 Wis. 2d 588, 607, 204 N.W.2d 897, 907; *Heath v. Zellmer*, 35 Wis. 2d 578, 599, 151 N.W.2d 664, 674 (1967).

238. *Hunker*, 57 Wis. 2d 588, 607, 204 N.W.2d 897, 907; *Conklin*, 38 Wis. 2d 468, 485, 157 N.W.2d 579, 587. Another quaint word formula for this conclusion is employed in New Hampshire. See *Maguire v. Exeter & Hampton Elec. Co.*, 114 N.H. 589, 592, 325 A.2d 778, 780 (1974) (rejected law "lies in the backwater of the modern stream").

239. This is a quite different retreat from 'pure' better law from that which has occurred in New Hampshire. There, a 'good' law of a state involved only territorially will be applied in a false conflict when the 'bad' law is very bad, *e.g.*, *Gagne v. Berry*, 112 N.H. 125, 130, 290 A.2d 624, 627 (1972), but the good law will yield to even a very bad law (limiting recovery of damages) when the only connection to the good law is the domiciliary status of a party, *Maguire v. Exeter & Hampton Elec. Co.*, 114 N.H. 589, 592-93, 325 A.2d 778, 780 (1974). Thus New Hampshire's 'better law' approach is restrained, and the best law is not chosen from all the states constitutionally eligible but only from those states that New Hampshire considers to be 'in the running' because of a greater connection to the case than the Constitution requires. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 314 (1981) (citing in n.19 of the plurality opinion *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856

In *Hunker*, the sole domiciliary state was Ohio, which did not give an injured worker who had received a worker's compensation award a second bite at the apple via a recovery in common-law tort against a negligent coemployee. Wisconsin, the state of injury, did. The court applied Ohio law, refusing, however, to declare it better. Indeed, the court said that Ohio's rule may not have been the more "justice-serving" one.²⁴⁰ Yet the Ohio law was not irrational and had support in several other states. It was not like the "anachronistic" guest statute—the "drag on the coattails of civilization"²⁴¹—involved in several prior choice of law cases in which 'better law' was the critical factor in making the choice. Finally, the court made it unmistakably clear that the result would have been different had the injured party been a Wisconsin domiciliary.²⁴² The opinion is clear that had the conflict been true-true, in interest analysis terminology, the break would have been to the superior Wisconsin law.²⁴³ The older 'pure' better law cases were not overruled by *Hunker* but were explained as falling under the exception for coattail drags and outworn creeds.

Lawyers and judges involved in Wisconsin tort cases should be able fairly to predict the result under Wisconsin's brand of interest analysis, which is blended with pure better law.²⁴⁴ It is a purposeful and workable form of eclecticism.

Although Wisconsin will seize upon a territorial connection as the constitutional basis for a pure better law choice in cases of extremely bad law selected under interest analysis, in contract cases territorialism is said to play an equally important part in the actual methodology. The Wisconsin Supreme Court has stated repeatedly that it employs both center of gravity and the better law method in contract cases.²⁴⁵ Wisconsin courts have

(1973), decided before *Maguire*) (domiciliary contact alone is constitutionally sufficient).

240. 57 Wis. 2d at 610, 204 N.W.2d at 908.

241. *Hunker*, 57 Wis. 2d 588, 607, 204 N.W.2d 897, 907.

242. "No Wisconsin citizens or Wisconsin interests suffer because damages are not awarded on the full tort basis." 57 Wis. 2d at 610, 204 N.W.2d at 908.

243. I also suspect that Wisconsin law would have applied had the conflict been true-disinterested—defendant from Wisconsin, plaintiff from Ohio—because of the increased Wisconsin connections to the litigation, although no specific language of the *Hunker* opinion addresses that problem.

244. Query: How will Wisconsin classify a limitation on wrongful death damages? Plaintiff gets a partial bite of the apple, as in *Hunker*, but does not trade full damages for a no-fault right of recovery, as in *Hunker*. I would predict that the wrongful death damages rule, because it has little support among the various states, would be labelled a drag on the coattails of civilization by the Wisconsin Supreme Court.

245. *Schlosser v. Allis-Chalmers*, 86 Wis. 2d 226, 271 N.W.2d 879 (1978); *Handl v. American Farmers Mut. Casualty Co.*, 79 Wis. 2d 67, 255 N.W.2d 903 (1977); *Haines v. Mid-Century Ins. Co.*, 47 Wis. 2d 442, 177 N.W.2d 328 (1970); *Peterson v. Warren*, 31 Wis. 2d 547, 143 N.W.2d 560 (1966). See also *Triple Interest, Inc. v. Motel 6, Inc.*, 414 F. Supp. 589 (W.D. Wis. 1976).

made no attempt to explain why center of gravity is utterly irrelevant in tort cases but is a recognized co-method apparently standing in double mishmash with the method used in tort cases. Is it an attempt to dilute the proplaintiff bias of the approach in tort law?

In any event, in a case in which the center of gravity and better law or interest analysis methods point to different results, some refinement in Wisconsin's approach to choice of law in contract cases has to be forthcoming. The opinions give no solid hints about what that will be. I would guess that the approach will be a repudiation of center of gravity and an adoption for contract cases of the same method used in tort cases. Meanwhile, however, considerable uncertainty exists because of the purposeless eclecticism in the opinions in contract cases raising choice of law issues.

G. Kentucky

For a period of nine years, from 1968 to 1977, there was one state, Kentucky, that had rejected the *lex loci* in favor of a modern choice of law approach that employed a wholly noneclectic method easily understood by bench and bar. This method, which I call 'the Kentucky Rule,' was straightforward, and the Kentucky high court stated it without needless verbiage. The case to adopt this Kentucky Rule was *Arnett v. Thompson*,²⁴⁶ which concerned an Ohio plaintiff and defendant in an accident in Kentucky. Three years before *Arnett* the Kentucky Court of Appeals, now the Supreme Court, had rejected the *lex loci* in *Wessling v. Paris*,²⁴⁷ which appeared to adopt the significant relation method of the Restatement Second, then in tentative draft stage. In *Arnett*, the court held:

Upon further study and reflection the court has decided that the conflicts question should not be determined on the basis of a *weighing* of interests,²⁴⁸ but simply on the basis of whether Kentucky has *enough* contacts to justify applying Kentucky law. Under that view if the accident occurs in Kentucky (as in the instant case) there is enough contact from that fact alone to justify applying Kentucky law. Likewise, if the

246. 433 S.W.2d 109 (Ky. 1968).

247. 417 S.W.2d 259 (Ky. 1967).

248. It is clear to me that the court really means here contacts, not interests as the latter term is understood by conflicts scholars and associated with Brainerd Currie's interest analysis. *Wessling* was decided with a citation to the Restatement Second before the present § 6 had been adopted in tentative draft form. The *Wessling* opinion at no time indulged in any form of interest analysis but instead seemed to use solely a territorial approach. *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), was cited and relied on but was said by the Kentucky high court to use a center of gravity or grouping of contacts approach. *Wessling*, 417 S.W.2d at 260. Apparently, the Kentucky court did not realize that *Babcock* also contained a strong dose of interest analysis mixed in with the center of gravity theory. See *supra* text accompanying notes 154-155.

parties are residents of Kentucky and the only relationship of the case to another state is that the accident happened there . . . there is enough contact with Kentucky to justify applying our law. The fact that we will apply Kentucky law where Kentucky people have an accident in Ohio or Indiana does not require that we apply Ohio or Indiana law where people of one of those states have an accident here, because the basis of the application is not a *weighing* of contacts but simply the existence of *enough* contacts with Kentucky to warrant applying our law.²⁴⁹

The court reiterated the *Arnett* approach in *Foster v. Leggett*,²⁵⁰ as follows: "[I]f there are significant contacts—not necessarily the most significant contacts—with Kentucky, the Kentucky law should be applied."²⁵¹ I have always understood this to mean that a Kentucky forum will always apply its own law when it constitutionally can do so.²⁵² By what test other than constitutional sufficiency could the court in *Arnett* have intended a determination of 'enough' contacts to be made? By my interpretation, then, 'significant' contacts in *Foster* means constitutionally significant contacts, and the term 'contacts' is broad enough to include 'interests' based solely on a contact of domicile of either party.²⁵³ The federal courts in post-*Arnett* choice of law cases²⁵⁴ have always ap-

249. 433 S.W.2d at 113 (emphasis in original). Elsewhere the opinion expressly rejects the significant relation approach of the Restatement Second. *Id.* at 112-13.

250. 484 S.W.2d 827 (Ky. 1972).

251. *Id.* at 829.

252. If this were the test intended, the only uncertainty left for the Kentucky bench and bar was what should be done if indeed Kentucky had insufficient connection to a case constitutionally to apply its own law. No hint to the solution of this problem appears in *Arnett* or *Foster*. See *supra* text accompanying notes 247-252 concerning the broad power of a forum to apply its own substantive law.

253. Indeed, the court in *Foster* relied primarily on the Kentucky domicile of plaintiff's decedent in concluding that there was ample basis for applying Kentucky law. 484 S.W.2d at 829. It follows that in a *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir. 1973), type of case in which the forum's only connection to the litigation was that it was the domicile of plaintiff or plaintiff's decedent in a wrongful death case, forum law favorable to the plaintiff would be applied under the Kentucky Rule. In a reverse *Rosenthal* situation, in which the only forum connection is plaintiff's domicile and its law is *unfavorable* to him, for example, a zero-interest case in the terminology of interest analysis, Kentucky would, under *Arnett*, apply its own law. Since the connecting factor of domicile at the time the cause of action arose would be sufficient, after *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), as a constitutional basis for applying state law without regard to interest, this analysis appears to be sound. The Minnesota Supreme Court in *Hague* applied forum law not because of the interest analysis approach but because it was the 'better law.' See *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 49 (Minn. 1979), *aff'd*, 449 U.S. 302 (1981).

254. These cases arise under diversity jurisdiction, and the *Erie* theory, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), requires the federal court to employ the choice of law method of the state in which the court sits, *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); or of the state of the district court in which the action commenced if it has come to the forum via a 28 U.S.C. §

plied Kentucky law when they could do so, although they have not expressly declared that *Arnett* used the constitutional limits on choice of law freedom as the yardstick for determining what contacts were 'enough.'²⁵⁵

Alas, uncertainty reentered Kentucky's choice of law process in 1977 with *Lewis v. American Family Insurance Group*.²⁵⁶ An Indiana domiciliary had been injured in a Kentucky accident caused by an uninsured Kentucky domiciliary. The injured plaintiff urged that he had a contract of insurance issued in Indiana by defendant insurance company.²⁵⁷ At issue were whether the policy with its uninsured motorist coverage had lapsed due to nonpayment of premiums and, if so, whether defendant was estopped to assert the lapse. Under Indiana law, there had been a lapse. Apparently under Kentucky law, the company had not taken appropriate steps to terminate coverage.

The choice of law analysis performed by the court in *Lewis* began by observing that Kentucky had rejected the traditional rule that focussed in contract cases on the place of making or place of performance. The court then stated:

The modern test is "which state has the most significant relationship to the transaction and the parties." . . . Under this test, in most cases, the law of the residence of the named insured will determine the scope of his automobile liability insurance policy. Section 193 of the Restatement Second states:

The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in sec. 6 to the transaction and the parties, in which event the local law of the other state will be applied.²⁵⁸

1404(a) (1976) transfer, *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

255. See especially *Kennedy v. Ziesmann*, 522 F. Supp. 730 (E.D. Ky. 1981), relying on the Kentucky domicile of a plaintiff injured in Ohio allegedly by an Ohio hospital as a basis for application of Kentucky law in a malpractice action. See also *Grant v. Bill Walker Pontiac-GMC, Inc.*, 523 F.2d 1301, 1304 (6th Cir. 1975) (declaring that Kentucky law is to be applied whenever it can be justified); *Harris Corp. Data Communications Div. v. Comair, Inc.*, 510 F. Supp. 1168 (E.D. Ky. 1981); *Hinton v. Hoskins*, 411 F. Supp. 282, 284 (W.D. Ky. 1981).

256. 555 S.W.2d 579 (Ky. 1977).

257. Defendant's domicile for choice of law purposes was not disclosed in the court's opinion, but since it was sued in Kentucky, it seems reasonable to assume that it at least did business there. That factor would be significant in assessing whether Kentucky law constitutionally could be applied. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 317-18 (1981).

258. 555 S.W.2d at 581-82 (quoting RESTATEMENT (SECOND) §§ 188, 193 (citation omit-

When *Lewis* was decided, there probably was some doubt about the constitutional application of Kentucky law to the issue of whether a multistate insurance company had terminated its contract with an Indiana domiciliary so that there was no coverage with respect to a Kentucky accident.²⁵⁹

Curiously, the plurality opinion in *Hague* did not overrule *Dick*, but instead recast the facts of that case so that Texas had no connection at all to the contract. The court in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 309 (1981), stated: "The policy was subsequently assigned to Mr. Dick, who was domiciled in Mexico" In the *Dick* case itself, the Court said: "[W]hen it was assigned to him . . . Dick actually resided in Mexico, although his permanent residence was in Texas." *Home Ins. Co. v. Dick*, 281 U.S. 397, 404 (1930). Surely "permanent residence" is the equivalent of domicile.

In any event, after *Hague*, the *Dick* case would not bar Kentucky from applying its own law in the *Lewis* situation, I am sure. The court, however, did not seem to turn to the Restatement Second to make a choice of law because Kentucky substantive law was constitutionally ineligible. Rather, the court seemed to adopt the Restatement Second method in-

ted)). See also *Prudential Resources Corp. v. Plunkett*, 583 S.W.2d 97, 100 (Ky. App. 1979), reading *Lewis* as adopting a most significant relationship test for choice of law. The latter case also involved contract rather than tort law.

259. The leading case at that time, 1977, on constitutional limits to a forum's freedom to make a choice of law was *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), involving a time-of-interest problem. The forum's connection with the contract occurred after it was made, when rights were assigned to a Texas domiciliary. This was held insufficient as a matter of substantive due process to enable application of Texas law to invalidate a provision of the contract. *Id.* at 401.

Subsequently, in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), the Supreme Court greatly broadened the power of the forum to decide a choice of law issue. Very little connection between the litigation and the state whose law is to be applied is required. When the issue is the validity of or meaning of a contract, connections of the state arising after the contract was entered into may be considered at least as part of the nexus between the state and the litigation. *Hague* generated an immense literature in a very short time, and all the commentators agree that it substantially loosened up constitutional restrictions on the choice of law process. See, e.g., Brilmayer, *supra* note 11, at 1315; Kozyris, *Reflections on Allstate—The Lessening of Due Process in Choice of Law*, 14 U.C.D. L. REV. 889, 901 *passim* (1981); Lowenfeld & Silberman, *Choice of Law and the Supreme Court: A Dialogue Inspired by Allstate Insurance Co. v. Hague*, 14 U.C.D. L. REV. 841, 850 *passim* (1981); Oldham, *Property Division in a Texas Divorce of a Migrant Spouse: Heads He Wins, Tails She Loses?*, 19 HOUS. L. REV. 1, 36-37 n.177; Peterson, *supra* note 1; Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 HOFSTRA L. REV. 59, 61-62 (1981); Twerski, *On Territoriality and Sovereignty: System Shock and Constitutional Choice of Law*, 10 HOFSTRA L. REV. 149, 151 n.9 (1981) (all scholars expected different result in *Hague*); von Mehren & Trautman, *supra* note 9, at 35; Weintraub, *Who's Afraid of Constitutional Limitations on Choice of Law?*, 10 HOFSTRA L. REV. 17, 17 (1981).

stead of the our-law-whenever-we-can method adopted in *Arnett*.

The notion that *Lewis*, although a contract case, must have overruled *Arnett* sub silentio is strengthened by the very recent opinion of the Kentucky Supreme Court in *Breeding v. Massachusetts Indemnity & Life Insurance Co.*²⁶⁰ The issue was whether an exclusion in a life insurance policy could be invoked by the insurer. Under just about any modern theory of choice of law, the Kentucky substantive law of insurance contracts would have prevailed.²⁶¹ The supreme court quoted from *Lewis*, including its citation to section 188 of the Restatement Second, and then stated:

Increasingly, states have adopted the grouping of contacts doctrine. Justice, fairness and the best practical result may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation

The merit of the doctrine followed in *Babcock, supra*, is that it gives to the forum having the most interest in the problem paramount control over the legal issues arising out of a particular factual context.²⁶²

With the declaration that *Babcock*, a tort case involving a guest statute, provides the choice of law method for Kentucky, it seems clear that eclecticism has infected choice of law methodology in both contract and tort cases. As has been noted, *Babcock* mixes both center of gravity and interest analysis, implying that the break device will be interest weighing, a device unuseable in true-disinterested conflicts. The Kentucky bench and bar have no guidance at all on what to do when territorial and interest analysis methods reach different results in a particular tort or contract case.²⁶³

In sum, Kentucky has moved from the state with the most precise and understandable choice of law methodology to a condition of apparent absence of a method.

IV. CONCLUDING OBSERVATIONS

Some examples of eclecticism—for example, Wisconsin's declaration that it uses both center of gravity and better law methods in contract cases—reflect either failure to examine the underlying theories that make the methods inconsistent or judicial schizophrenia about the nature of sovereign power.

260. 633 S.W.2d 717 (Ky. 1982).

261. The intermediate appellate court applied the old *lex loci* approach and looked to the place of delivery of the master policy.

262. 633 S.W.2d at 719 (citing *Babcock*, 240 N.Y.S.2d at 749, 191 N.E.2d at 283).

263. Observe in the quote above the mixing of territorial theory—"grouping of contacts"—with interest analysis—"most interest" and "greatest concern."

The ultimate goal of a choice of law method is to select a jurisdiction to take control of a dispute and resolve it.²⁶⁴ Current choice of law methods are based on one of three views about the basis of allocation of sovereign power.

The first and historic view can be called the geographic allocation; the sovereign is viewed as wanting to exercise power on the basis of events happening within its geographic territory—occurrence of a tort, execution of a contract,²⁶⁵ and so forth. These jurisdictions use either the *lex loci* or center of gravity methods—the latter if flexibility is desired, the former if certainty of result and ease of application of the method is preferred in implementing the territorial approach to choice of law.

The second view of sovereignty employs what can be called a popular (people-based) allocation of power. The government is seen as concerned with regulating and protecting its domiciliaries, not only when they act within the borders of the state but also when they are in the geographic territory of another sovereign. Such a government is not concerned with regulating or protecting nondomiciliaries just because they happen to act within the state. (Perhaps it is more correct to say that the sovereign may have an interest, but it recognizes, because of its view of allocation of sovereign power, that it should yield to the greater interest of domiciliary states.) Such jurisdictions would employ interest analysis as their meth-

264. With *dépeçage*, it is more correct to say that the methodology determines which jurisdiction takes control of an issue, and in some cases multiple sovereigns combining their laws will regulate the outcome.

265. This is, of course, a simplification. On several issues the choice of law methods reflecting the geographic-allocation view of sovereign power make a domiciliary reference, for example, on the issue of succession to movables. *RESTATEMENT* § 303; *RESTATEMENT (SECOND)* § 260. The great majority of such domiciliary references involve what can be termed 'common ground' issues, that is, issues on which all methods employ the same choice-selecting technique almost out of instinctive feeling that any other choice would be irrational. Thus, interest analysis judges will invariably apply the law of the decedent's domicile to a succession issue involving movables without determining if there is a false conflict or true conflict and without consulting the jurisdiction's break devices. A 'better law' court, too, can be expected to apply the intestate succession law of decedent's domicile without comparing it for trendiness or soundness of judgment with intestate succession laws of the states where the movables are located or where alleged heirs are domiciled. In a similar vein, interest analysis and better law courts, along with territorialists, will apply conduct-governing laws of the situs, such as rules of the highway, without regard to what law is better or to what other jurisdictions may have interests in resolving the dispute.

"There are statutes whose purely local applicability—traffic laws, licensing laws, court procedures, qualification for office—is evident. If the statute speaks, the court obeys it." *Leflar, Conflicts Law*, *supra* note 1, at 1088. *See also* *Brilmayer, supra* note 11, at 396-97, 400, 406; *Reese, supra* note 8, at 321 ("A handful of narrow choice of law rules . . . have the overwhelming support of the courts."). It is with issues outside the 'common ground' that choice of law methodologies differ depending on the forum's views on the proper allocation of sovereign power.

odology and break true conflicts by interest weighing, comparative impairment, or Brainerd Currie's resort to forum law; that is, they would use break devices consistent with the 'personal law' theory employed in identifying conflicts as false, true-true, or true-disinterested.

The third view of sovereignty looks to the role of the judicial branch as an implementation of sovereign power and considers the doing of justice in each case the proper allocation or exercise of such sovereign power. Justice is handed out to domiciliary and nondomiciliary alike without constraints of territoriality.²⁶⁶ Such jurisdictions will employ the better law methodology.

Critics will howl that much more than a view of allocation of sovereign power underlies choice of law method. The maintenance of good relations with other sovereigns, they will assert, is necessarily one factor that also influences the choice of law method. I am not so sure that this is true in a time of widespread disagreement among American jurisdictions on choice of law methodology, which reflects disagreement on the appropriate allocation of sovereign power in multistate problem cases. The reason for this is that the forum, as sovereign, expects other jurisdictions to share its views on allocation of power. Certainly, the forum is not about to change its views about this allocation by way of some quasi-renvoi simply because another jurisdiction involved in the matter at bar happens to be one with differing views on allocation of sovereign power.

For example, the court in *Milkovich v. Saari*,²⁶⁷ which reached a result much criticized by interest analysis adherents,²⁶⁸ happened to be a conflict between a pure better law forum, Minnesota, and the province of Ontario, which used a territorial approach to choice of law.²⁶⁹ Whatever result an Ontario court might have reached in *Milkovich*, the province could not be offended by a decision that the historic *lex loci* method would also have made, even if Minnesota's reasoning were the better law approach, which is foreign to Ontario notions of sovereign allocation.

266. Again, the discussion here relates to issues outside the 'common ground.' See *supra* note 265. Obviously, a jurisdiction that uses the better law method for choice of law on some issues will employ a territorial reference for such matters as rules of the road, criminality of conduct, and so forth.

267. 295 Minn. 155, 203 N.W.2d 408.

268. See WEINTRAUB, COMMENTARY, *supra* note 117, § 6.27, at 329. (Professor Weintraub criticizes a similar Wisconsin case, *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968)).

269. See *James Richardson & Sons, Ltd. v. The Burlington*, 1931 S.C.R. 76 (*lex loci contractus* in contract case unless parties have selected different law); *Bunge v. North American Grain Com v. The Sharp*, (1933) Ex. C.R. 75 (*lex loci contractus*); *Kutzner v. Allstate Ins. Co.*, 1982 I.L.R. 1-1472 (a center of gravity approach in a contract case). In tort cases both *lex fori* and *lex loci* are employed, *Going v. Reid Brothers Motor Sales, Ltd.*, 35 Ont. 2d 201 (H.C. 1982).

Likewise, if the parties had been from New Hampshire or Wisconsin, which also employ the 'better law' principle, the result in *Milkovich* would not have offended the other sovereign involved, and there would have been no threat to interstate order and relations.

Suppose the couple in *Milkovich* were from California, New York, or Oregon, all of which would have recognized the case as a false conflict and would have applied the law of the common domicile. Now the forum, Minnesota, can recognize that the application of its own law might be viewed by the other involved state as meddling in the affairs of that other state. In a conflict of laws setting, however, Minnesota does not accept the California, New York, or Oregon view of allocation of sovereign power. Surely Minnesota is not going to alter its approach to choice of law because the other involved sovereign would reach a different result on the same facts, especially when the still-popular *lex loci* method would reach the same result as Minnesota's better law approach.

Likewise, if the guest-host girls in *Tooker v. Lopez*²⁷⁰ had been going to school in California rather than Michigan, New York could have applied its own law confident that the other involved state would not be offended. That is so because California shares New York's attitude toward allocation of sovereign power in false conflict situations. Nor would the *Tooker* result have harmed interstate relations had the girls been in Minnesota rather than Michigan, because Minnesota would agree with the outcome although it would reach it through a different methodology. It so happened that the other involved state was Michigan, which was until very recently a *lex loci* jurisdiction. The territorialists shriek with horror at the *Tooker* result,²⁷¹ and New York could expect that Michigan would be offended by what it viewed as New York's meddling in Michigan affairs. But New York did not alter, nor should it be expected to alter, its choice of law methodology because of the happenstance that Michigan had a different view of sovereignty.

In sum, as long as a jurisdiction's method reaches a result in a case that has at least some modest level of support among the various American jurisdictions, with each applying its own methodology, concerns of maintaining good interstate relations will not move the forum to alter its methodology. Better law is the only method that is a candidate for rejection because of nationwide lack of support in choice of law thinking, but I believe that it has attained sufficient foothold so that it will not now be rejected because of the risk of offending another sovereign.²⁷²

270. 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

271. See, e.g., Twerski, *supra* note 259, at 161-62.

272. There are, however, fact situations in which all states except Minnesota would give judgment for the defendant. *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43 (Minn. 1979), *aff'd*, 449 U.S. 302 (1981), is one. Wisconsin would have located the insurance company as well as

Although eclecticism usually involves the intermixing of different theories regarding sovereignty, I find some eclecticism by interest analysis courts reasonable and acceptable. California's use of better law—for that is what comparative pertinence is, primarily—as its second choice break device for true conflicts exemplifies this type of purposeful eclecticism. The first choice break device, comparative impairment, is consistent with the theory of sovereignty that underlies interest analysis, but it can resolve very few conflicts. Although it once accepted Currie's forum break theory,²⁷³ California now refuses to employ that technique, and the reason seems clear enough: California believes that Currie's forum bias is offensive to interstate relations.²⁷⁴ The other device consistent with the personal law theory of interest analysis, interest weighing, is rejected by California for much the same reasons as Currie rejected it: it is impossible. Moreover, even if it were possible, it cannot be used in half of the true conflict cases, the true-disinterested, and hence some additional break device had to be found. It is said that necessity is the mother of invention, and thus California invented its eclectic mixing of better law and interest analysis.²⁷⁵

With *Neumeier*,²⁷⁶ New York has eclectically mixed territorialism with interest analysis by using *lex loci*, or perhaps center of gravity, as a break device.²⁷⁷ New York obviously has concluded that each of the break devices consistent with the sovereign theory underlying interest analysis is unworkable—for example, interests cannot be weighed—or unacceptable because it is destructive of interstate relations—for example, Currie's fo-

the third party beneficiary in Wisconsin. Since the conflict was false and the common domiciliary law would give some recovery (plaintiff wanted three bites at the apple under Minnesota law, and Wisconsin was believed to give him only one bite), the court would have applied the common domiciliary law even though another involved law was 'better.' See *Hunker v. Royal Indem. Co.*, 57 Wis. 2d 588, 204 N.W.2d 897 (1973). New Hampshire would have found insufficient territorial connection in Minnesota to apply its better law in *Hague*. See *supra* note 26. For various reasons I am confident that Rhode Island and Arkansas, which have also flirted with better law, would not have decided *Hague* as did Minnesota.

273. See *supra* text accompanying note 110.

274. See, e.g., *Brilmayer*, *supra* note 11, at 409-10; *Trautman*, *supra* note 17, at 114.

275. The *Offshore* case, see *supra* text accompanying notes 132-50, also indicated that if comparative pertinence is unable to break a true conflict—because, for example, each law is trendy and is attempting to achieve the same societal goal but in a different way—territorialism should be used to break the conflict. This ultimate fallback position is also purposeful eclecticism because it relieves the court of the need to declare one law better when the court feels it cannot do so fairly. The purpose of such eclecticism is to have a way of deciding the case without sacrificing entirely the Currie-esque method based on a 'popular' allocation of sovereign power.

276. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64.

277. So have those states that interpret Restatement Second and its § 6 as employing a center of gravity method with an exception for false conflicts (defined in Currie-esque fashion). See *supra* notes 102-103 and accompanying text.

rum break. Better law apparently involves a value judgment that New York is unwilling to make. It therefore returns to territorialism in all true conflict cases.

Perhaps a majority of choice of law cases do not present false conflicts, which means that New York is employing more often than not a method of choice of law that revolves on a theory of allocation of sovereign power that New York considers secondary to the people-based theory of interest analysis. New York thus declines to extend its law extraterritorially except in situations in which all the affected parties are New Yorkers. While most interest analysis adherents are probably upset by such a great restriction of that methodology, I cannot renounce New York's eclecticism as unreasonable.

While the eclecticism that interest analysis courts employ to produce break devices can be viewed as purposeful eclecticism, no other eclectic usage is defensible. The double mishmash approach—that is, “We use both better law and center of gravity”—is absurd and nonsensical, not only because a ‘tie’ can result and no choice of law can be made (when the center of gravity is, for instance, in the state with the worse law) but also because the forum ought to be able to decide whether the appropriate basis for allocation of sovereign power is the people-oriented theory or the justice-rendering theory.

Also unacceptable to me is the notion that one method may be appropriate for one category of case and another method based on a different theory of allocation of sovereign power, appropriate for a different category. For example, one New York court has announced that New York uses interest analysis in tort cases and center of gravity in contract cases.²⁷⁸ I cannot imagine why New York should have different attitudes about allocation of sovereign power depending on a tort or contract label. It is true that within the broad areas of tort and contract, there are issues that can be subjected to no other choice method than First Restatement rule-based territorialism.²⁷⁹ If New York courts assume a people-based exercise of sovereign power when the legislature enacts a protective rule in the field of torts, such as replacing liability based on negligence with strict liability, why would New York courts not maintain that assumption when the legislation affects contract rights, such as mandating a type of warranty or protecting against overreaching through adhesion contracts?

278. *American Home Assur. Co. v. Employers Mutual*, 77 A.D.2d 421, 434 N.Y.S.2d 7 (1980). See the apt criticism in Herzog, *Conflict of Laws, 1981 Survey of New York Law*, 33 SYRACUSE L. REV. 117, 147-48 (1982), observing that a leading recent conflicts case from the New York Court of Appeals concerning contracts was *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969), in which the approach used was, unmistakably, interest analysis.

279. See *supra* notes 187, 230, 265, 266.

Each American jurisdiction should not only choose one method of choice of law—a pure method or a hybrid like New York's—but must also explain it with clarity and particularity to attorneys and lower court judges.²⁸⁰ For example, although I *think* I know what New York's present choice of law method is, its court of appeals should have taken the opportunity since the 1972 *Neumeier* decision to explain the significance of the large and critical shift in theory that *Neumeier* made. But all it has provided is a cryptic and actually misleading snippet to the effect that *lex loci* is the "general rule."²⁸¹ I have the curiosity of the scholar to learn if my interpretation is correct; but the bench and bar of New York must view the needed assistance as an absolute necessity.

280. See Juenger, *supra* note 1, at 420.

281. *Cousins v. Instrument Flyers, Inc.*, 44 N.Y.2d 698, 699, 376 N.E.2d 914, 915, 405 N.Y.S.2d 441, 442 (1978).